# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

No. 305.

THE PENNSYLVANIA COMPANY, PLAINTIFF IN ERROR,

vs.

JOSEPH E. ROY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

**FILED OCTOBER 15, 1877.**

Proclamation de clôture

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms in the city of Chicago, in the district aforesaid, before the judges thereof, on Saturday, the twenty-eighth day of July, in the year of our Lord one thousand eight hundred and seventy-seven, and of our Independence the one hundred and second year.

WILLIAM H. BRADLEY,
*Clerk.*

JOSEPH E. ROY
*v.*
THE PENNSYLVANIA COMPANY. } Case.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the 5th day of March, A. D. 1877, came the said plaintiff, Joseph E. Roy, by Messrs. John Van Arman and Henry F. Vallette, his attorneys, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in the district aforesaid, his bond for costs and tran-
2 script of the record of the proceedings had in the superior court of Cook County in the State of Illinois, in said entitled cause; which said bond and transcript are respectively in the words and figures following, to wit:

*Bond for costs.*

UNITED STATES OF AMERICA,
*Northern District of Illinois, ss:*

Circuit court, March term, A. D. 1877.

JOSEPH E. ROY
*vs.*
PENNSYLVANIA COMPANY. } In

I enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court, and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, hereby agree and stipulate that execution may issue against my property for any costs taxed against him. Dated this 5th day of March, A. D. 1877.

JNO. VAN ARMAN,
GORDON.

(Endorsed:) Filed M'ch 5, A. D. 1877. Wm. H. Bradley, clerk.

3 *Transcript of record.*

UNITED STATES OF AMERICA,
*State of Illinois, County of Cook, ss:*

Pleas before the honorable Joseph E. Gary, one of the judges of the superior court of Cook County in the State of Illinois, holding a branch court of said court, at a regular term of said superior court of Cook County, begun and holden at the court-house in the city of Chicago, in said county and State, on the first Monday, being the fifth day of February, in the year of our Lord one thousand eight hundred and seventy.

seven, and of the Independence of the United States of America the one hundred and first.

Present, the honorable Joseph E. Gary, judge of the superior court of Cook County; Luther Laflin Mills, prosecuting attorney; Charles Kern, sheriff of Cook County.

Attest:

JOHN J. HEALY, *Clerk.*

Be it remembered that heretofore, to wit, on the twentieth day of December, in the year of our Lord one thousand eight hundred and seventy-six, Joseph E. Roy, plaintiff, by Van Arman and Vallette, his attorneys, filed in the office of the clerk of the superior court of Cook County his declaration, which is in the words and figures as follows, to wit:

4 STATE OF ILLINOIS,
*Cook County, ss:*

In the superior court of Cook County, of the January term, A. D. 1877.

Joseph E. Roy, plaintiff in this suit, by Van Arman and Vallette, his attorneys, complains of The Pittsburgh, Fort Wayne, and Chicago Railroad Company, the Pennsylvania Company, and The Pullman Palace Car Company, defendants in this suit, of a plea of trespass on the case.

For that whereas heretofore, and before and at the time of the committing of the grievances hereinafter mentioned, to wit:

On the fifth day of June, A. D. 1876, the said defendants were possessed of and using and operating a certain railroad extending through and from, to wit, from the city of Chicago in said county, to the city of Philadelphia, in the State of Pennsylvania, and were using and operating upon said railroad passenger-cars and sleeping-cars and coaches for the conveyance of passengers thereon and therein for reward from said city of Chicago to said city of Philadelphia, and the said plaintiff, at said city of Chicago, to wit, on the fifth day of June, A. D. 1876, paid
5 to said defendants a reasonable hire and reward to safely carry and transport the said plaintiff from said city of Chicago to said city of Philadelphia, in the cars used and operated upon said railroad by said defendants and said plaintiff, at said Cook County, to wit, on the day and year last aforesaid, then became a passenger in certain cars of said defendants, commonly called sleeping-cars, on a certain train of the defendants on the said railroad to be carried from said city of Chicago to said city of Philadelphia, for said hire and reward paid as aforesaid to said defendants on that behalf, and it then and there became and was the duty of said defendants to furnish secure and safe cars and appliances therein, and to employ skilful, careful, and competent servants, agents, and employees to manage such cars and appliances therein, that the said plaintiff might and should be safely and securely carried and transported from the said city of Chicago to said city of Philadelphia. Yet the said defendants did not regard their duty, nor use due care in that behalf, but on the contrary thereof, and while the said plaintiff with all due care upon his part was then and there sitting in one of the seats of
6 the said cars of said defendants commonly called a sleeping car, by reason of the defective, insecure, and unsafe appliances by which the upper berth in said car was upheld and fastened and by reason of the unskilfulness, carelessness and incompetency of the servants, agents and employees of said defendants, the said upper berth became

and was detached without the fault of said plaintiff, and said upper berth then and there fell upon the head of said plaintiff with great force and violence, by means whereof the head of the said plaintiff was greatly hurt, bruised, and wounded, and thereby caused a concussion of the brain of the said plaintiff, and said plaintiff was otherwise greatly hurt, bruised, and wounded, and by reason of the said blow upon the head as aforesaid the said plaintiff was obliged to and did then and there lay out and pay divers large sums of money, to wit, three thousand dollars, in and about endeavouring to be cured of the said injuries so received as aforesaid, and also by means of the premises the plaintiff then and there became and was sick, sore, and disordered and so remained for a long time, to wit, hitherto, during all which time the plaintiff
7 suffered great pain of body and mind, and was hindered and prevented from transacting and attending to his business and affairs and lost and was deprived of divers great gains and profits which he might otherwise and would have made and acquired, to wit, at said Cook County.

And whereas also the said defendants, The Pittsburgh, Fort Wayne and Chicago Railroad Company and the said Pennsylvania Company, before and at the time of the committing of the grievances hereinafter mentioned, were the owners and proprietors of a certain other railroad extending and running from the city of Chicago in said Cook County, to, wit, the city of Philadelphia in the State of Pennsylvania, and the defendants aforesaid and said defendant The Pullman Palace Car Company were operating and using upon said road, sleeping cars for the conveyance of passengers therein from said city of Chicago to said city of Philadelphia, and the said plaintiff on, to wit, the fifth day of June, A. D. 1876, became and was a passenger on one of the trains of said defendants, the said railroad company*s*' and in one of said sleeping cars owned and operated by said railroad company*s* and said Pullman Palace Car Company to be carried from said city of Chicago to said
8 city of Philadelphia for certain reasonable reward and theretofore paid by said plaintiff to said defendants in that behalf; and it then and there became and was the duty of said defendants to furnish and provide perfect, safe and secure sleeping cars, and to employ skilful, careful, and competent servants, agents, and employees to manage said cars so that said plaintiff might and should be secure and safe from injury to his person whilst using and occupying said cars as a passenger therein as aforesaid. Yet the said defendants did not regard their duty nor use due care in that behalf, but on the contrary thereof, the bolts, fastenings and appliances used by said defendants to uphold and sustain the upper berths in said sleeping cars were imperfect, defective, and out of repair and so suffered to remain by said defendants, and the said servants, agents, and employees of said defendants unskilfully and carelessly managed said cars and said bolts, fastenings, and appliances used as aforesaid, whereby the same were insecure and unsafe, and the said plaintiff whilst such passenger and while using due care and diligence upon his part was then and there sitting on
9 one of the seats in said sleeping cars one of the said upper berths therein and over the said seat occupied by the plaintiff by reason of the imperfect and defective condition of the bolts, fastenings and appliances used to sustain said upper berth, and by reason of the unskilfulness, carelessness, and incompetency of said servants, agents and employees of said defendants in managing the bolts, fastenings, and appliances thereto and thereof, fell down and upon the said plaintiff with great force and violence without the fault of said plaintiff, and

then and there struck upon the head of said plaintiff, by means whereof the head of said plaintiff was greatly hurt, bruised, and wounded, and said plaintiff was otherwise greatly hurt and injured, and by reason of the said blow upon the head and said injuries the said plaintiff was obliged to and did then and there lay out and pay divers large sums of money, to wit, three thousand dollars, in and about endeavouring to be cured of the said injuries so received as aforesaid.

And also by means of the premises the plaintiff then and there became and was sick, sore and disordered, and so remained for a long time, to wit, hitherto, during all which time the plaintiff suffered great pain of body and mind and was hindered and prevented from transacting and
10 attending to his business and affairs, and lost and was deprived of divers great gains and profits which he might otherwise and would have made and acquired, to wit, at said Cook County.

And whereas also the said defendants, The Pittsburgh, Fort Wayne and Chicago Railroad Company and the said Pennsylvania Company, before and at the time of committing of the grievances hereinafter mentioned, were the owners and proprietors of a certain other railroad extending and running from the city of Chicago in said Cook County, to to wit, the city of Philadelphia in the State of Pennsylvania, and the defendants aforesaid and said defendant The Pullman Palace Car Company were operating and using upon the said railroad sleeping cars for the conveyance of passengers therein from said city of Chicago to said city of Philadelphia, and the said plaintiff, on, to wit, the fifth day of June, A. D. 1876, became and was a passenger on one of the trains of said defendants the said Pittsburgh, Fort Wayne and Chicago Railroad Company and the said Pennsylvania Company, and in one of the said sleeping cars owned and operated by said Pullman Palace Car Company and the said Pittsburgh, Fort Wayne and Chicago Railroad Company and said Pennsylvania Company, to be carried from said
11 city of Chicago to said city of Philadelphia for certain reasonable reward theretofore paid by said plaintiff to said defendants in that behalf, and it then and there became and was the duty of said defendants to furnish and provide perfect, safe and secure sleeping cars and to employ skilful, careful and competant servants, agents and employees to manage said cars so that said plaintiff might and should be secure and safe from injury to his person whilst using and occupying said cars as a passenger therein, as aforesaid, yet the said defendants did not regard their duty nor use due care in that behalf, but on the contrary thereof, the said servants, agents, and employees of said defendants unskiltully and carelessly managed said cars and the bolts, fastenings and appliances used therein, whereby the same were unsafe and insecure, and the said plaintiff, whilst such passenger and while using due care and diligence upon his part was then and there sitting on one of the seats in said sleeping cars, and one of the said upper berths therein and over the said seat occupied by the plaintiff by reason of the unskilfulness, carelessness, incompetency, and negligence of
12 said servants, agents, and employees of said defendants in managing the bolts, fastenings, and appliances thereof, then and there fell down and upon the said plaintiff with great force and violence without the fault of said plaintiff, and then and there struck upon the head of said plaintiff, by means whereof the head of said plaintiff was greatly hurt, bruised, and wounded, and said plaintiff was otherwise greatly hurt and injured, and by reason of the said blow upon the head and said injuries the said plaintiff was obliged to and did then and there lay out and pay divers large sums of money, to wit, three thousand

dollars, in and about endeavouring to be cured of said injuries so received as aforesaid.

And also by means of the premises the plaintiff then and there became and was sick, sore and disordered, and so remained for a long time, to wit hitherto, during all which time the plaintiff suffered great pain of body and mind, and was hindered and prevented from transacting and attending to his business and affairs and lost and was deprived of divers great gains and profits which he might otherwise and would have made and acquired, to wit, at said Cook County.

And whereas also the said defendants, the Pittsburg, Fort
13 Wayne and Chicago Railroad Company and the said Pennsylvania Company, before and at the time of the committing of the grievances hereinafter mentioned, were the owners and proprietors of a certain other railroad extending and running from the city of Chicago, in said Cook County, to wit, the city of Philadelphia, in the State of Pennsylvania, and the defendants aforesaid, and said defendant, the Pullman Palace Car Company, were operating and using upon the said railroad sleeping cars for the conveyance of passengers therein from said city of Chicago to said city of Philadelphia, and the said plaintiff on, to wit, the fifth day of June, A. D. 1876, became and was a passenger on one of the trains of said defendants, the said Pittsburg, Fort Wayne and Chicago Railroad Company, and the said Pennsylvania Company, and on one of the said sleeping cars, owned and operated by said Pittsburgh, Fort Wayne and Chicago Railroad Company and the said Pennsylvania Company, and said Pullman Palace Car Company, to be carried from said city of Chicago to said city of Philadelphia for certain reasonable reward theretofore paid by said plaintiff to said defendants in that behalf, and it then and there became and was
14 the duty of said defendants to furnish and provide perfect, safe, and secure sleeping cars so that the said defendant might and should be secure and safe from injury to his person whilst using and occupying said cars as a passenger therein as aforesaid, yet the defendants did not regard their duty nor use due care in that behalf, but on the contrary thereof, the bolts, fastening and appliances used by said defendants to uphold and sustain the upper berths in said sleeping car were imperfect, defective, and out of repair, and so suffered to remain by said defendants, and the said plaintiff, whilst such passenger and while using due care and diligence upon his part, was then and there sitting on one of the seats in said sleeping car, and one of the said upper berths therein and over the said seat occupied by the plaintiff, by reason of the imperfect and defective condition of the bolts, fastenings, and appliances used to sustain said upper berth, fell down and upon the said plaintiff with great force and violence without the fault of said plaintiff, and then and there struck upon the head of said plaintiff, by means whereof the head of said plaintiff was greatly hurt, bruised, and injured, and said plaintiff was otherwise greatly hurt and injured, and by
15 reason of the said blow upon the head and said injuries the said plaintiff was obliged to and did then and there lay out and pay divers large sums of money, to wit, three thousand dollars, in and about endeavouring to be cured of said injuries so received as aforesaid.

And also, by means of the premises the plaintiff then and there became and was sick, sore, and disordered, and so remained for a long time, to wit, hitherto, during all which time the plaintiff suffered great pain of body and mind, and was hindered and prevented from transacting and attending to his business and affairs and lost and was deprived of divers great gains and profits which he might otherwise and would

have made and acquired, to wit, at said Cook County To the damage of said plaintiff twenty-five thousand dollars, and therefore he brings suit, &c.

VAN ARMAN and VALLETTE,
*Pl'ff's Att'ys.*

And on the day and year last aforesaid, to wit, December 20, A. D. 1876, there issued out of the office of the clerk of said court the people's writ of summons, which said writ, with the return of the sheriff thereon endorsed, is in the words and figures as follows, to wit:

16 STATE OF ILLINOIS,
*Cook County, ss:*

The people of the State of Illinois to the sheriff of said county, greeting:

We command you that you summon Pittsburgh, Fort Wayne and Chicago Railroad Company, The Pennsylvania Company, and The Pullman Palace Car Company, if they shall be found in your county, personally to be and appear before the superior court of Cook County, on the first day of the term thereof, to be holden at the court-house in Chicago, in said Cook County, on the first Monday of January next, to answer unto Joseph E. Roy in a plea of trespass on the case to damage of said plaintiff, as it is said, in the sum of twenty-five thousand dollars, and have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness, John J. Healy, clerk of our said court, and the seal thereof, at Chicago aforesaid, this 20th day of December, A. D. 1876.

[SEAL.] JNO. J. HEALY,
*Clerk*

(Endorsed:)

The defendant, Pennsylvania Company, accept service of the within writ this 21st day of December, A. D. 1876.

F. H. WINSTON AND
GEO. WILLARD,
*Att'ys for Penn. Co.*

17 The defendant, Pullman Palace Car Company, accept service, this 21st day of Dec., 1876.

WIRT DEXTER, *Att'y.*

And afterwards, to wit, on the sixth day of January, in the year of our Lord one thousand eight hundred and seventy-seven, The Pennsylvania Company, impleaded, etc., by F. H. Winston and George Willard, its attorneys, filed in the office of the clerk of said court its plea, which is in the words and figures as follows, to wit:

STATE OF ILLINOIS,
*Cook County, ss:*

In the superior court thereof, of the January term, A. D. 1877.

JOS. E. ROY
*v.*
PENNSYLVANIA COMPANY, IMPLEADED, &C.

And the said defendant, The Pennsylvania Company, impleaded, etc.,

by F. H. Winston and Geo. Willard, its attorneys, comes and defends the wrong and injury, when, &c., and says that it is not guilty of the said supposed grievances above laid to its charge, or any or either of them, or any part thereof, in manner and form as the said plaintiff
18 hath above thereof complained against it, and of this it, the said defendant, puts itself upon the country, &c., by

F. H. WINSTON AND
GEO. WILLARD,
*Defendant's Attorneys.*

And afterwards, to wit, on the twenty-sixth day of January, in the year last aforesaid, to wit, A. D. 1877, the same being one of the days of the January term of said court, the following, among other proceedings, were had in said court, and entered of record, to wit:

14212—JOSEPH E. ROY
*vs.*
65165—PITTSBURGH, FORT WAYNE AND CHICAGO Railroad Company, The Pennsylvania Company, and The Pullman Palace Car Company. } Case.

This day comes the plaintiff to this suit, by John Van Arman and H. F. Vallette, his attorneys, and thereupon, on motion of plaintiff, it is ordered that this suit be, and the same is hereby, dismissed as to the defendants Pittsburg, Fort Wayne and Chicago Railroad Company, and The Pullman Palace Car Company, and that the plaintiff have
19 leave to file herein an amended declaration, and that the defendant, The Pennsylvania Company, be required to plead thereto within ten days from this date.

And on the day and year last aforesaid, to wit, January 26, A. D. 1877, the plaintiff, by his attorneys aforesaid, filed in the office of the clerk of said court his amended declaration, which is in words and figures as follows, to wit:

STATE OF ILLINOIS,
*Cook County, ss:*

In the superior court of Cook County of the January term, A. D. 1877.

Joseph E. Roy, plaintiff in this suit, by Van Arman and Vallette, his attorneys, complains of The Pennsylvania Company, defendant in this suit, of a plea of trespass on the case for that whereas heretofore, and before and at the time of the committing of the grievances hereinafter mentioned, to wit, on the fifth day of June, A. D. 1876, the said defendant was possessed of and using and operating a certain railroad, extending through and from, to wit, from the city of Chicago, in said county, to the city of Philadelphia, in the State of Pennsylvania, and was using and operating upon said railroad passenger cars and sleeping cars and coaches for the conveyance of passengers thereon and
20 therein for reward from said city of Chicago to said city of Philadelphia.

And the said plaintiff, at said city of Chicago, to wit, on the fifth day of June, A. D. 1876, paid to the said defendant a reasonable hire and reward to safely carry and transport the said plaintiff from said city of Chicago to said city of Philadelphia in the cars used and operated upon

said railroad by said defendant, and said plaintiff, at said city of Chicago, in said Cook County, to wit, on the said day and year last aforesaid, then became a passenger in certain cars of said defendant, commonly called sleeping cars, on a certain train of the defendant on the said railroad, to be carried from said city of Chicago to said city of Philadelphia, for said hire and reward paid as aforesaid to said defendant in that behalf, and it then and there became and was the duty of said defendant to furnish secure and safe cars and appliances thereon, and to employ skilful, careful and competent servants, agents, and employees to manage such cars and appliances thereon, that the said plaintiff might and should be safely and securely carried and transported from the said city of Chicago to said city of Philadelphia, yet the
21 said defendant did not regard its duty nor use due care in that behalf, but on the contrary thereof, and while said plaintiff, with all due care upon his part, was then and there sitting in one of the seats of one of the said cars of said defendant, commonly called a sleeping car, by reason of the defective, insecure and unsafe appliances by which the upper berth in said car was upheld and fastened, and by reason of the unskilfulness, carelessness and incompetency of the servants, agents and employees of said defendant, the said upper berth became and was detached without the fault of said plaintiff, and said upper berth then and there fell upon the head of said plaintiff with great force and violence, by means whereof the head of said plaintiff was greatly hurt, bruised and wounded, and thereby causing a concussion of the brain of said plaintiff, and said plaintiff was otherwise greatly hurt, bruised and wounded, and by reason of the said blow upon the head as aforesaid the said plaintiff was obliged to and did then and there lay out and pay divers large sums of money, to wit: three thousand dollars, in and about endeavouring to be cured of the said injuries so received as aforesaid, and by means of the premises the plaintiff then and there
22 became and was sick, sore and disordered, and so remained for a long time, to wit, hitherto, during all which time the plaintiff suffered great pain of body and mind, and was hindered and prevented from transacting and attending to his business and affairs, and lost and was deprived of divers great gains and profits which he might otherwise and would have made and acquired.

And whereas also the said defendant the said Pennsylvania Company before and at the time of the committing of the grievances hereinafter mentioned, was the owner and proprietor of a certain other railroad extending and running from the city of Chicago, in said Cook County, to, to wit, the city of Philadelphia, in the State of Pennsylvania, and was operating and using upon said road sleeping cars for the conveyance of passengers therein from said city of Chicago to said city of Philadelphia.

And the said plaintiff on, to wit, the fifth day of June, A. D. 1876, became and was a passenger on one of the trains of said defendant and in one of the said sleeping cars used and operated by said defend-
23 ant, to be carried from said city of Chicago to said city of Philadelphia, for certain reasonable reward theretofore paid by said plaintiff to said defendant in that behalf, and it then and there became and was the duty of said defendant to furnish and provide perfect, safe, and secure sleeping cars and to employ skilful, careful, and competent servants, agents, and employees to manage said cars, so that the said plaintiff might and should be secure and safe from injury to his person whilst using and occupying said cars as a passenger therein as aforesaid. Yet the said defendant did not regard its duty nor use due care in that behalf, but on the contrary thereof the bolts, fastenings, and appliances

used by said defendant to uphold and sustain the said upper berths in said sleeping cars were imperfect, defective, and out of repair, and so suffered to remain by said defendant, and the said servants, agents, and employees of said defendant unskilfully and carelessly managed said cars, and said bolts, fastenings, and appliances used as aforesaid, whereby the same were insecure and unsafe, and the said plaintiff, whilst such passenger and while using due care and diligence upon his part, was then
24 and there sitting on one of the seats in said sleeping cars, and one of the said upper berths therein and over the said seat occupied by the plaintiff, by reason of the imperfect and defective condition of the bolts, fastenings, and appliances used to sustain said upper berth, and by reason of the unskilfulness, carelessness, and incompetency of said servants, agents, and employees of said defendant in managing and working sad bolts, fastenings, and appliances thereto and thereof, fell down and upon the said plaintiff with great force and violence, without the fault of said plaintiff, and then and there struck upon the head of said plaintiff, by means whereof the head of said plaintiff was greatly hurt, bruised, and wounded and said plaintiff was otherwise greatly hurt and injured, and by reason of the said injuries, so received as aforesaid, the said plaintiff was obliged to and did lay out and pay divers large sums of money, to wit, three thousand dollars, in and about endeavouring to be cured of the said injuries so received as aforesaid, and also by means of the premises the plaintiff then and there became and was sick, sore, and disordered, and so remained for a long time, to wit, hitherto, during all which time the plaintiff suffered great pain
25 of body and mind and was hindered and prevented from transacting and attending to his business and affairs, and lost and was deprived of divers great gains and profits which he might otherwise and would have made and acquired.

And whereas also the said defendant, the said Pennsylvania Company, before and at the time of the committing of the grievances hereinafter mentioned, was the owner and proprietor of a certain other railroad extending and running from the city of Chicago, in said Cook County, to, to wit, the city of Philadelphia, in the State of Pennsylvania, and was operating and using upon said road sleeping cars for the conveyance of passengers therein from the said city of Chicago to the said city of Philadelphia; and the said plaintiff on, to wit, the fifth day of June, A. D. 1876, became and was a passenger on one of the trains of said defendant, and in one of the said sleeping cars used and operated by said defendant, to be carried from said city of Chicago to said city of Philadelphia for certain reasonable reward theretofore paid by said plaintiff to said defendant in that behalf; and it then and there became and was the duty of said defendant to furnish and provide perfect, safe, and secure sleeping cars so that the said plaintiff might and should be secure and safe from injury to his person whilst using and occupying
26 said cars as a passenger therein as aforesaid. Yet the said defendant did not regard its duty nor use due care in that behalf, but on the contrary thereof the bolts, fastenings, and appliances used by said defendant to uphold and sustain the upper berths in said sleeping cars were so imperfect, defective, and out of repair and so suffered to remain by said defendant; and the said plaintiff whilst such passenger and while using due care and diligence on his part was then and there sitting on one of the seats in said sleeping car and one of the said upper berths therein and over the said seat occupied by the plaintiff, by reason of the imperfect and defective condition of the bolts, fastenings, and appliances used to sustain said upper berths, fell down and upon the said

plaintiff with great force and violence without the fault of said plaintiff, and then and there struck upon the head of said plaintiff, by means whereof the head of said plaintiff was greatly hurt, brused, and injured, and said plaintiff was otherwise greatly hurt and injured, and by reason of the said injuries so received as aforesaid the said plaintiff was obliged to and did then and there lay out and pay divers
27 large sums of money, to wit, three thousand dollars, in and about endeavouring to be cured of the said injuries so received as aforesaid, and also by means of the premises the plaintiff then and there became and was sick, sore, and disordered and so remained for a long time to wit, hitherto, during all which time the plaintiff suffered great pain of body and mind, and was hindered and prevented from transacting and attending to his business and affairs and lost and was deprived of divers great gains and profits which he might otherwise and would have made and acquired.

And whereas, also, the said defendant the said Pennsylvania Company, before and at the time of the committing of the grievances hereinafter mentioned, was the owner and proprietor of a certain other railroad extending and running from the city of Chicago in said Cook County, to, wit,the city of Philadelphia, in the State of Pennsylvania, and was operating and using upon said road sleeping cars for the conveyance of passengers therein from said city of Chicago to said city of Philadelphia, and the said plaintiff on, to wit, the fifth day of June, A. D. 1876, became and was a passenger on one of the trains of said defendant, and in one of the said sleeping cars used and
28. operated by said defendant, to be carried from said city of Chicago to said city of Philadelphia, for certain reasonable reward theretofore paid by said plaintiff to said defendant in that behalf, and it then and there became and was the duty of said defendant to furnish and provide perfect, safe, and secure sleeping-cars, and to employ skilful, careful, and competent agents, servants, and employees to manage said cars, so that the said plaintiff might and should be secure and safe from injury to his person whilst using and occupying said cars as a passenger therein as aforesaid, yet the said defendant did not regard its duty nor use due care in that behalf, but, on the contrary thereof, the said servants, agents, and employees of said defendant unskilfully and carelessly managed said cars, and the bolts, fastenings, and appliances used to sustain the upper berth in said sleeping-car, and the said plaintiff whilst such passenger, and while using due care and diligence on his part, was then and there sitting on one of the seats in one of the said sleeping-cars, and one of the said upper berths therein and over the said seat occupied by said plaintiff, by reason of the unskilfulness,
29 carelessness, and incompetency of said servants, agents, and employees of said defendant in managing and working said bolts, fastenings, and appliances used to sustain and uphold said upper berth, fell down and upon the said plaintiff with great force and violence, without the fault of said plaintiff, and then and there struck upon the head of said plaintiff, by means whereof the head of said plaintiff was greatly hurt, bruised, and wounded, and said plaintiff was otherwise greatly hurt and injured, and by reason of the said injuries so received as aforesaid the said plaintiff was obliged to and did then and there lay out and pay divers large sums of money, to wit, three thousand dollars, in and about endeavouring to be cured of the said injuries so received as aforesaid, and also by means of the premises the plaintiff then and there became and was sick, sore, and disordered, and so remained for a long time, to wit, hitherto, during all which time the plaintiff suffered great

pain of body and mind, and was hindered and prevented from transacting and attending to his business and affairs, and lost and was deprived of divers great gains and profits which he might otherwise and
30 would have made and acquired; to the damage of said plaintiff twenty-five thousand dollars, and therefore he brings suit, &c.

VAN ARMAN AND VALLETTE,
*Pl'ff's Att'ys.*

And afterwards, to wit, on the fifteenth day of February, in the year last aforesaid, to wit, A. D. 1877, the Pennsylvania Company, defendant, by F. H. Winston and Geo. Willard, its attorneys, refiled in the office of the clerk of said court its plea, which is in the words and figures as follows, to wit:

STATE OF ILLINOIS,
*Cook County, ss:*

In the superior court thereof, of the January term, A. D. 1877.

JOS. E. ROY
*vs.*
PENNSYLVANIA COMPANY, IMPLEADED, ETC.

And the said defendant, the Pennsylvania Company, impleaded, etc., by F. A. Winston and Geo. Willard, its attorneys, comes and defends the wrong and injury, when, &c., and says that it is not guilty of the said supposed grievances above laid to its charge, or any or either of them or any part thereof, in manner and form as the said plaintiff
31 hath above thereof complained against it. And of this it the said defendant puts itself upon the country, &c.

By F. H. WINSTON AND
GEO. WILLARD,
*Defendant's Attorneys.*

And afterwards, to wit, on the first day of March, in the year last aforesaid, to wit, A. D. 1877, the plaintiff, by his attorneys aforesaid, filed in the office of the clerk of said court his petition and bond (for removal of said cause into the circuit court of the United States for the northern district of Illinois), which are in the words and figures as follows, to wit:

*Petition.*

STATE OF ILLINOIS,
*County of Cook, ss:*

In the superior court of Cook County.

JOSEPH E. ROY, PLAINTIFF,
*vs.*
PENNSYLVANIA COMPANY, DEFENDANT. } Case.

To the honorable superior court of Cook County:

32 Your petitioner, Joseph E. Roy, of the of , county of Cook and State of Illinois, respectfully represents unto this honorable court that he is the plaintiff in the above-entitled cause.

That said suit is now pending and undetermined in this court.

That no trial has been and under the rules of said court no trial could have been heretofore had thereof in this court.

That the plaintiff in said suit is a citizen of the State of Illinois, and that the defendant, the Pennsylvania Company, is a corporation created and existing under and by virtue of the laws of the State of Pennsylvania, and that there is a controversy in said suit between the plaintiff and defendant therein.

That the matter in dispute in said suit exceeds in value the sum of five hundred dollars exclusive of costs.

Your petitioner therefore prays that said suit may be transferred from this honorable court into the circuit court of the United States, in and for the northern district of Illinois, in accordance with the act of Congress in such case made and provided.

And your petitioner will ever pray, &c.

33 JOSEPH E. ROY.

JOHN VAN ARMAN AND HENRY F. VALLETTE,
*Plaintiff's Att'ys.*

STATE OF ILLINOIS,
*County of Cook, ss:*

Henry F. Vallette, being duly sworn, deposes and says that he is the agent and attorney of Joseph E. Roy, whose name is subscribed to the foregoing petition; that he has read the same and knows the contents thereof; and that the statement of facts contained in said petition is true.

HENRY F. VALLETTE.

Subscribed and sworn to before me this 21st day of February, A. D. 1877.

[NOTARIAL SEAL.] ALFRED H. GORDON,
*Notary Public.*

STATE OF NEW YORK,
*County of Ontario, ss:*

Joseph E. Roy, being duly sworn, deposes and says that he is the petitioner whose name is subscribed to the foregoing petition; that he has read the same and knows the contents thereof; and that the statement of facts contained in said petition is true.

JOSEPH E. ROY.

34 Subscribed and sworn to this 10th day of February, 1877, before me, a notary public.

[NOTARIAL SEAL.] J. A. SUTHERLAND.

*Bond.*

Know all men by these presents that we, Joseph E. Roy and Henry W. Austin, are held and firmly bound unto the Pennsylvania Company in the penal sum of five hundred dollars, for the payment of which sum, well and truly to be made, we do hereby bind ourselves, our heirs, executors, administrators, and assigns firmly by these presents, sealed with our seals and signed this 10th day of February, A. D. 1877.

The condition of the above obligation is such, that whereas there is now pending and undetermined in the superior court of Cook County, upon the common law side thereof, a suit wherein Joseph E. Roy is

plaintiff, and the Pennsylvania Company is defendant, and whereas said
Joseph E. Roy, the plaintiff, has filed in said superior court of
35 Cook County his certain petition for the removal of said cause from said court into the circuit court of the United States in and for the northern district of Illinois, in accordance with the act of Congress in such case made and provided:

Now, therefore, if the said Joseph E. Roy shall well and truly enter in said circuit court of the United States in and for the northern district of Illinois, on the first day of its next session, a copy of the record in said suit, and pay all costs that may be awarded by the said circuit court of the United States, in case said circuit court of the United States shall hold that said suit shall have been wrongfully or improperly removed thereto, then and in such case these presents and everything herein contained shall be null and void; otherwise to be and remain in full force and effect.

JOSEPH E. ROY. [SEAL.]
HENRY W. AUSTIN. [SEAL.]

STATE OF NEW YORK,
*Ontario Co., ss:*

Personally appeared before me, a notary public, Joseph E. Roy, personally known by me to be the person named in the above instrument, and acknowledge' he executed the same.

[NOTARIAL SEAL.] J. A. SUTHERLAND,
*Notary Public.*

36 And on the day and year last aforesaid, to wit, March 1st, A. D. 1877, the same being one of the days of the February term of said court, the following among other proceedings were had in said court, and entered of record, to wit:

14212—JOSEPH E. ROY
*v.*
65165—THE PENNSYLVANIA COMPANY. } Case.

This day again comes the plaintiff to this suit, by his attorneys aforesaid, and files herein his petition based on affidavit to remove this cause to the United States circuit court in and for the northern district of Illinois; and it appearing to the court that the said plaintiff has filed herein his bond, conditioned according to the act of Congress in such case made and provided, it is ordered that said cause be and the same is hereby transferred to said United States circuit court, and that the clerk do forthwith transmit a full transcript of all papers and pleadings on file herein, to said United States circuit court, together with all orders made and entered of record herein.

STATE OF ILLINOIS,
*Cook County, ss:*

I, John J. Healy, clerk of the superior court of Cook County,
37 within and for the State of Illinois, do hereby certify that the above and foregoing is a full, true, and complete transcript of all papers and pleadings now on file in my office, and of all orders made and entered of record in said court in a certain cause lately pending in said court on the common law side thereof, wherein Joseph E. Roy was plaintiff, and the Pennsylvania Company et al. defendants.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Chicago, this 3rd day of March, A. D. 1877.

[SEAL.] JNO. J. HEALY,
*Clerk.*

(Endorsed:) Filed M'ch 5, '77. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the 9th day of July, A. D. 1877, in the July term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

JOSEPH E. ROY
*vs.*
THE PENNSYLVANIA COMPANY. } Trespass on the case.

38 Now come the parties by their attorneys, and upon issue joined thereupon come a jury of good and lawful men, to wit, Lucius J. Cobb, B. R. Wagner, P. Ray Isham, A. M. Pool, Thomas Carr, Lyman D. McDaid, D. G. Courtney, Louis J. Levin, Joseph Stephenson, Perry Walker, T. N. Allen, and Nathaniel Moore, who were all duly elected, tried, and sworn, well and truly to try said issue, and after hearing the evidence and the arguments of counsel and receiving the instructions of the court, the jury retired to consider of their verdict, and by agreement of the parties by their attorneys the jury, when they shall have agreed upon their verdict, may sign and seal the same and deliver it to the clerk and disperse.

Afterwards, to wit, on the 10th day of July, A. D. 1877, in the said July term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

JOSEPH E. ROY
*vs.*
THE PENNSYLVANIA COMPANY. } Case.

The jury in this behalf empaneled and sworn this day returned into court their sealed verdict, wherein they say, "We, the jury, find
39 the defendant guilty and assess the plaintiff's damages to the sum of ten thousand dollars," and thereupon the defendant, by its attorney, moves the court for a new trial herein.

Afterwards, to wit, on the 28th day of July, A. D. 1877, in the said July term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

JOSEPH E. ROY
*vs.*
THE PENNSYLVANIA COMPANY. } Case.

Now comes the defendant by George Willard, esq., its attorney, and now comes on to be heard the motion of the defendant heretofore entered herein for a new trial of this cause, and after hearing the arguments of the defendant's counsel, the court overrules said motion and awards judgment, to which ruling of the court the defendant by his attorney excepts.

It is thereupon considered and adjudged by the court that the plaintiff do have and recover of the defendant the said sum of ten thousand dollars, his damages so as aforesaid assessed, together with his costs and charges in this behalf expended, amounting to the sum of sixty-
40 seven dollars and seventy-five cents, and that he have execution therefor.

And on the same day, to wit, the 28th day of July, A. D. 1877, on the hearing of said cause, the following exceptions were taken and allowed by the court and made of record in said entitled cause, to wit:

*Bill of exceptions.*

UNITED STATES OF AMERICA,
*Northern District of Illinois, ss:*

In the circuit court thereof, term A. D. 1877.

JOSEPH E. ROY
*v.*
THE PENNSYLVANIA COMPANY.

Bill of exceptions.

Be it remembered that on the trial of said cause at the July term, A. D. 1877, of said court, the said plaintiff to maintain the issues on his part introduced testimony as follows, to wit:

Joseph E. Roy, the said plaintiff, having been duly sworn, gave evidence in his own behalf tending to prove as follows, to wit:

That the defendant, Pennsylvania Company, was the lessee and operator of the Pittsburgh, Fort Wayne and Chicago Railway.

That on the 5th day of June, 1876, the plaintiff purchased at its office, in Chicago, a first-class railroad ticket from Chicago to Philadel-
41 phia via defendant's line, and paid therefor the sum of $14.40.

That at the same time and place and of the same person he purchased a sleeping car ticket, for which he paid the sum of $5.00.

That he took the train leaving at a quarter past five o'clock p. m., the same day, and went immediately into the section of the berth he had engaged and about nine o'clock retired for the night. That he arose in the morning, and whilst breakfasting at Alliance, met a friend (Trowbridge), who had taken passage in another sleeping car in the same train. That the plaintiff, upon invitation of his friend, entered this car, and the two taking a seat together entered into conversation. That whilst thus seated the upper berth fell. Whereupon the porter of the car came at once and put up the berth, saying it would not fall again. That the plaintiff and his friend thereupon resumed their conversation, but that the berth fell again shortly after, this time striking the plaintiff upon the head, thereby injuring his brain and incapacitating him from the performance of his usual avocations and necessitating medical treatment.

That the plaintiff had travelled a great deal and often rode in sleeping cars since the time when such cars first came into use. That the
42 way in which he obtained sleeping car accom'odations was by the purchase of sleeping car tickets. That he knew of various sleeping car companies, including the Pullman Palace Car Company, with which he had been acquainted since its organization.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Chicago, this 3rd day of March, A. D. 1877.

[SEAL.] JNO. J. HEALY,
*Clerk.*

(Endorsed:) Filed M'ch 5, '77. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the 9th day of July, A. D. 1877, in the July term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

JOSEPH E. ROY
*vs.*
THE PENNSYLVANIA COMPANY. } Trespass on the case.

38 Now come the parties by their attorneys, and upon issue joined thereupon come a jury of good and lawful men, to wit, Lucius J. Cobb, B. R. Wagner, P. Ray Isham, A. M. Pool, Thomas Carr, Lyman D. McDaid, D. G. Courtney, Louis J. Levin, Joseph Stephenson, Perry Walker, T. N. Allen, and Nathaniel Moore, who were all duly elected, tried, and sworn, well and truly to try said issue, and after hearing the evidence and the arguments of counsel and receiving the instructions of the court, the jury retired to consider of their verdict, and by agreement of the parties by their attorneys the jury, when they shall have agreed upon their verdict, may sign and seal the same and deliver it to the clerk and disperse.

Afterwards, to wit, on the 10th day of July, A. D. 1877, in the said July term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

JOSEPH E. ROY
*vs.*
THE PENNSYLVANIA COMPANY. } Case.

The jury in this behalf empaneled and sworn this day returned into court their sealed verdict, wherein they say, "We, the jury, find
39 the defendant guilty and assess the plaintiff's damages to the sum of ten thousand dollars," and thereupon the defendant, by its attorney, moves the court for a new trial herein.

Afterwards, to wit, on the 28th day of July, A. D. 1877, in the said July term of said court, in the record of the proceedings thereof in said entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

JOSEPH E. ROY
*vs.*
THE PENNSYLVANIA COMPANY. } Case.

Now comes the defendant by George Willard, esq., its attorney, and now comes on to be heard the motion of the defendant heretofore entered herein for a new trial of this cause, and after hearing the arguments of the defendant's counsel, the court overrules said motion and awards judgment, to which ruling of the court the defendant by his attorney excepts.

It is thereupon considered and adjudged by the court that the plaintiff do have and recover of the defendant the said sum of ten thousand dollars, his damages so as aforesaid assessed, together with his costs and charges in this behalf expended, amounting to the sum of sixty-
40 seven dollars and seventy-five cents, and that he have execution therefor.

And on the same day, to wit, the 28th day of July, A. D. 1877, on the hearing of said cause, the following exceptions were taken and allowed by the court and made of record in said entitled cause, to wit:

*Bill of exceptions.*

UNITED STATES OF AMERICA,
*Northern District of Illinois, ss:*

In the circuit court thereof, term A. D. 1877.

JOSEPH E. ROY
*v.*
THE PENNSYLVANIA COMPANY.

Bill of exceptions.

Be it remembered that on the trial of said cause at the July term, A. D. 1877, of said court, the said plaintiff to maintain the issues on his part introduced testimony as follows, to wit:

Joseph E. Roy, the said plaintiff, having been duly sworn, gave evidence in his own behalf tending to prove as follows, to wit:

That the defendant, Pennsylvania Company, was the lessee and operator of the Pittsburgh, Fort Wayne and Chicago Railway.

That on the 5th day of June, 1876, the plaintiff purchased at its office, in Chicago, a first-class railroad ticket from Chicago to Philadel-
41 phia via defendant's line, and paid therefor the sum of $14.40.

That at the same time and place and of the same person he purchased a sleeping car ticket, for which he paid the sum of $5.00.

That he took the train leaving at a quarter past five o'clock p. m., the same day, and went immediately into the section of the berth he had engaged and about nine o'clock retired for the night. That he arose in the morning, and whilst breakfasting at Alliance, met a friend (Trowbridge), who had taken passage in another sleeping car in the same train. That the plaintiff, upon invitation of his friend, entered this car, and the two taking a seat together entered into conversation. That whilst thus seated the upper berth fell. Whereupon the porter of the car came at once and put up the berth, saying it would not fall again. That the plaintiff and his friend thereupon resumed their conversation, but that the berth fell again shortly after, this time striking the plaintiff upon the head, thereby injuring his brain and incapacitating him from the performance of his usual avocations and necessitating medical treatment.

That the plaintiff had travelled a great deal and often rode in sleeping cars since the time when such cars first came into use. That the
42 way in which he obtained sleeping car accom'odations was by the purchase of sleeping car tickets. That he knew of various sleeping car companies, including the Pullman Palace Car Company, with which he had been acquainted since its organization.

That on the occasion in question he bought the sleeping-car ticket for the purpose of occupying a sleeping-car from Chicago to Philadelphia, having the car to sit in in the day time and sleep in in the night time.

That at the time he purchased said sleeping-car ticket he did not know what company ran the sleepers, whether it was the Pennsylvania Company or some other company; but that when he got to the train he found it was a Pullman car; that he used the tickets for the passage for which he purchased them.

That there was a sleeping-car conductor and a sleeping-car porter with the car in which he had engaged his berth; that the porter performed such service as making up the berths and attending to the wants of the passengers.

That the said Pennsylvania Company provided cars in which passengers having railroad tickets could ride without necessitating the purchase of a sleeping-car ticket, and that he, the plaintiff, would
43 have gone into one of those cars if he had not purchased a sleeping-car ticket.

That he, the plaintiff, did not know whether the said Pennsylvania Company had any control over the interior arrangements of the sleeping-cars, such as letting down and putting up the berths.

That the berth which the plaintiff purchased was on the left-hand side going east, at the forward end of the car; that after the first night the porter gave him a berth in the middle of the car.

That the berth which fell down was on the left-hand side going east, and very near the middle of the sleeping-car. That the sleeping-car in which the accident occurred was next in front of the sleeping-car in which the plaintiff's berth was located.

During the examination of said Joseph E. Roy as a witness, as aforesaid, his counsel asked him a certain question, as follows:

Question. Will you give the ages of your children?

To which said question counsel for the defendant then and there duly objected as being immaterial and incompetent, which said objection the court thereupon overruled. To which said ruling of the court the said defendant then and there duly excepted.

44 And thereupon said witness gave testimony tending to show that one son was ten years old, that one daughter was fourteen years old, that another daughter was seventeen years old, and that another of his daughters was twenty-one years old.

Thereupon counsel for said plaintiff asked him, the said plaintiff, during his examination as a witness in said cause, a further question, as follows:

Question. What is your financial situation?

To which said question counsel for the defendant then and there duly objected as being immaterial and incompetent, which said objection the court thereupon overruled. To which said ruling of the court the said defendant then and there duly excepted.

And thereupon said witness gave testimony tending to show that he had two parcels of real estate, both of which were mortgaged to the amount of seven thousand dollars; that one parcel was rented for twenty dollars per month, and the other was not rented, and that he had no other sources of income since his injuries.

Thereupon J. H. Trowbridge, having been duly sworn, gave evidence tending to show as follows:

That he, the witness, took the sleeping-car at Chicago on Mon-
45 day evening, June 5th, 1876, and that the next morning, after breakfasting at Alliance, he invited the plaintiff into said sleeping-

car, which was next in front of the plaintiff's said sleeping-car, and that the plaintiff and witness sat in the latter's seat.

That soon after the berth fell the second time the plaintiff returned to his own car.

That after the second fall the brace or arm which supported the berth, when down, was found to be broken; that the conductor of the car and the porter thereupon fastened up the berth with a cord; that he, the witness, purchased his sleeping-ticket in Chicago; that said sleeping-car ticket was a Pullman Palace Car Company ticket; that the business of said Pullman Palace Car Company is the running of sleeping-cars on the various roads; that there was a sleeping-car conductor and a sleeping-car porter, and a conductor of the train; that the sleeping-car conductor wore a uniform—a cap and sort of a band.

Thereupon the plaintiff introduced in evidence a time and distance card of the defendant corporation issued, published, and circulated by said company during the year A. D. 1876, prior to the date of said accident, which card contained, amongst other things, the following statements, to wit:

FORT WAYNE AND PENNSYLVANIA R. R. LINE.

46 The only line running direct to the Centennial.

Three express trains leave Chicago as follows:

9.00 a. m., special fast express, with popular vestibule sleeping-car.

5.15 p. m., Atlantic express, with drawing-room and hotel car.

10.00 p. m., night express, with drawing-room sleeping-car.

Passage, excursion, and sleeping-car tickets can be purchased at the company's office, No. 65 South Clark st.

THE FORT WAYNE AND PENNSYLVANIA LINE.

The popularity of this old reliable line is constantly and steadily on the increase.

The efforts of the managers to make the road the best is fully appreciated by the public. No road has a better or smoother track. No road has better motive power. No road has better coaches. No road offers equal facilities in the number of through trains equipped with Pullman palace sleeping-cars.

ADVANTAGES OF THE PITTSBURGH, FT. WAYNE AND PENNSYLVANIA THROUGH LINE.

3. Only line running three through trains with Pullman palace cars.

9. It is the only line running sleeping-cars from Chicago and intermediate stations to Philadelphia without change.

*Palace sleeping-cars*

EASTWARD.

47 *Fast day express.*

One palace car, Chicago to New York.

*Atlantic express.*

One palace drawing-room car, Chicago to New York. One palace car, Chicago to Philadelphia. One hotel car.

*Night express.*

One palace drawing-room car, Chicago to Washington.

WESTWARD.

*Limited mail.*

One palace drawing-room car, Pittsburg to Chicago.

*Day express.*

One palace car, Washington to Chicago.

*Pacific express.*

One palace drawing-room car, New York to Chicago. One hotel car, New York to Chicago.

*Night express.*

One palace drawing-room car, New York to Chicago. One palace car, Philadelphia to Chicago.

PULLMAN'S SLEEPING-CAR RATES.

From Chicago—

*Full berths.*

| | | | |
|---|---|---|---|
| To Crestline | $1 50 | To Philad'phia | $5 00 |
| " Alliance | 2 00 | " New York | 5 00 |
| " Pittsburg | 2 50 | " Baltimore | 5 00 |
| " Altoona | 3 50 | " Washington | 5 00 |
| " Harrisburg | 4 00 | Full sections double above price. | |

48 Tickets for sale in office 65 Clark street; Grand Pacific Hotel; Palmer House, and at the depot.

And the defendant, to maintain the issues on its part, offered to prove—

1. That the sleeping-car in which the accident in question occurred, and all the sleeping-cars then and theretofore, since the 27th January, 1870, on the defendant's line, were owned by the Pullman Palace Car Co., a corporation of the State of Illinois, and were not owned by the defendant; that said sleeping-cars were run in the same trains with the defendant's cars; that holders of railroad tickets were entitled to ride in said sleeping-cars, provided such holders also held sleeping-car tickets.

2. That said Pullman Palace Car Co., and it only, issued tickets for sale entitling passengers to ride in said sleeping-cars; that such tickets were plainly distinguishable from railroad tickets, and were sold at offices established by said company, and indicated to be a place for the sale of such tickets; that the plaintiff purchased the sleeping-car ticket of the same person of whom he bought the railroad ticket; that the office where purchased indicated by plain lettering upon the door of

said office that it was a place for the sale of Pullman Palace Car
49 Company tickets, as well as railroad tickets.

3. That said Pullman Palace Car Company employed persons to take charge of said cars, and whilst in use the same were in the immediate charge of a conductor and a porter employed by said company; that said conductor and porter were the only persons who had authority to manage and control the interior of said cars, and the berths and seats and the appurtenances thereto.

Which said proof the said plaintiff, by his counsel, objected to, which objection the court sustained. To which said ruling of the court the said defendant, by its counsel, thereupon then and there duly excepted.

Which were the only questions of fact tending to prove which either of the parties to said suit offered any testimony, except as to the extent of the injury to the plaintiff and the damages resulting to him from the same.

Thereupon the court charged the jury as follows, to wit:

1. That the proof tends to show that the injury was received by reason of the negligence of the defendant's agents or servants, or by some negligence in the construction of the car in which the plaintiff was riding.

To which charge the said defendant, by its counsel, then and
50 there duly excepted, as being unsupported by the testimony.

And to which said defendant then and there excepted, also, as assuming as a matter of fact that the persons in charge of said sleeping-car were defendant's agents or servants.

The court thereupon further charged the jury, as follows:

2. That "the defendant has offered in your presence to prove that the car in which the plaintiff was injured was not the car or the actual property of the defendant, but was the property of another corporation. But I instruct, as a part of the law of this case, that if this car composed a part of the train in which the plaintiff and other passengers were to be transported upon their journey, and the plaintiff was injured while in that car without any fault of his own, and by reason either of the defective construction of the car or by some negligence on the part of those having charge of the car, then the defendant is liable."

To which charge the said defendant then and there duly excepted as being contrary to the law.

The court further charged the jury that the measure of plaintiff's damages was the pecuniary loss sustained by him in consequence
51 of the injuries received; that in determining such damages they should take into consideration the amount paid by plaintiff for medical attendance necessary for his proper treatment; the plaintiff's station in life; his standing in his profession; his ability to earn money before he was injured, and how far that ability has been impaired by his injuries as shown by the proof. But the jury should not take into consideration any evidence touching the plaintiff's pecuniary condition at the time he received the injury, because it is wholly immaterial how much a man may have accumulated up to the time he is injured, the real question being how much his ability to earn money in the future has been impaired. And in this connection you should take into account such of the evidence as tends to show that the injuries received by plaintiff may be permanent. But the damages should not be suppositious or speculative nor vindictive, but should be such as are clearly indicated and sustained by the evidence.

Inasmuch as the matters and things aforesaid do not appear of record in said cause, the said defendant presents this bill of exceptions,

and prays that it may be signed and sealed by the court and hereby made a part of the record of said cause.

52 And it is done accordingly.

H. W. BLODGETT. [SEAL.]

(Endorsed:) Filed July 28, 1877. Wm. H. Bradley, cl'k.

53 And afterwards, to wit, on the 15th day of August, A. D. 1877, said defendant, by its solicitors, filed in said clerk's office its bond in said entitled cause, which said bond is in the words and figures following, to wit:

Supreme Court of the United States.

JOSEPH E. ROY
*vs.*
PENNSYLVANIA COMPANY.

*Bond.*

Know all men by these presents that we, the Pennsylvania Company, a corporation of the State of Pennsylvania, and George M. Pullman as surety, of the county of Cook, in the State of Illinois, are held and firmly bound unto Joseph E. Roy, of the county of Cook, in the State of Illinois, in the sum of fifteen thousand dollars ($15,000.00), to be paid to the said Joseph E. Roy, his executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our successors, heirs, executors, and administrators, firmly by these presents, sealed with our seals, dated this tenth day of August, A. D. 1877.

Whereas the above-named Pennsylvania Company hath prosecuted a writ of error to the Supreme Court of the United States to

54 reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the northern district of Illinois:

Now, therefore, the condition of this obligation is such that if the above-named Pennsylvania Company shall prosecute its said writ of error to effect, and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and virtue.

THE PENNSYLVANIA COMPANY,
By WM. THAW, [SEAL.]
*Vice-President.*
GEO. M. PULLMAN, [SEAL.]

Attest:
JNO. C. CONN,
*Assistant Secretary.*

Security of the within bond is hereby approved.
August 15, 1877.

JNO. VAN ARMAN,
*Counsel for Def't in Appeal.*

Approved by direction of the court.

WM. H. BRADLEY, *Clk.*

(Endorsed:) Filed Aug. 15, 1877. Wm. H. Bradley, Cl'k.

55 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in the cause wherein Joseph E. Roy is the plaintiff, and The Pennsylvania Company is the defendant, as the same appears from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this 14th day of September, A. D. 1877, and of our Independence the one hundred and second year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

56 UNITED STATES OF AMERICA,
*Northern District of Illinois, ss:*

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is before you in said circuit court between Joseph E. Roy, plaintiff, and The Pennsylvania Company, defendant, a manifest error hath happened, to the great damage of the said The Pennsylvania Company, as by its complaint appears, and it being fit that the error, if any there has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1877, in the Supreme Court to be then and there held; that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this thirtieth day of July, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States the 102d year.

[SEAL.] WM. H. BRADLEY,
*Clerk of the Circuit Court of United States,*
*Northern District of Illinois.*

(Indorsed:) Supreme Court of the United States. Joseph E. Roy vs. The Pennsylvania Company. Writ of error.

57 UNITED STATES OF AMERICA, *ss:*

To Joseph E. Roy, greeting:

You are hereby cited and and monished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein The Pennsylvania Company is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said

Supreme Court of the United States, this 18th day of August, in the year of our Lord one thousand eight hundred and seventy-seven.

H. W. BLODGETT, *Judge.*

Rec'd copy above Sept. 3, 1877.

VAN ARMAN & VALLETTE,
*Att'ys for Pl'ff.*

58 Supreme Court of the United States, of October term, A. D. 1877.

PENNSYLVANIA COMPANY, PLAINTIFF IN ERROR,
*vs.*
JOSEPH E. ROY, DEFENDANT IN ERROR.

Afterwards, to wit, on the second Monday of October, in the same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Pennsylvania Company, by Geo. Willard, its attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

1. The said circuit court erred in overruling the objections, and each of them, interposed by the plaintiff in error to the questions asked the witness Roy.

2. The said circuit court erred in sustaining the objection interposed by the defendant in error to the proof offered on behalf of
59 said plaintiff in error.

3. The said circuit court erred in giving to the jury those, and each of those, portions of the charge which were excepted to by the plaintiff in error.

And the said Pennsylvania Company prays that the judgment aforesaid may be reversed, annulled, and altogether held for nought, and that it may be restored to all things which it hath lost by occasion of said judgment.

GEO. WILLARD,
*Attorney for Plaintiff in Error.*

(Indorsed:) Supreme Court of the United States. Pennsylvania Co. vs. Joseph E. Roy. Citation.

(Indorsement on cover:) No. 305. The Pennsylvania Company, plaintiff in error, vs. Joseph E. Roy. N. Illinois, C. C. U. S. Filed 15th October, 1877.

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# SUPREME COURT OF THE UNITED STATES.

Error to the Circuit Court of the United States for the Northern District of Illinois.

THE PENNSYLVANIA COMPANY,
Plaintiff in Error,

*v.*

JOSEPH E. ROY,
Defendant in Error.

# BRIEF AND ARGUMENT

*FOR PLAINTIFF IN ERROR.*

CHICAGO:
BEACH, BARNARD & CO., LEGAL PRINTERS 104 RANDOLPH STREET
1880.

# SUPREME COURT OF THE UNITED STATES.

THE PENNSYLVANIA COMPANY,
Plaintiff in Error,

*v.*

JOSEPH E. ROY,
Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois.

## STATEMENT OF CASE.

The plaintiff began his action in the Superior Court of Cook County, Illinois, against the Pullman Palace Car Company, the Pittsburg, Fort Wayne and Chicago Railroad Company, and the Pennsylvania Company.

The original declaration filed in the Superior Court charged (pages 2 to 6 of printed record):

*First Count.* That on the fifth day of June, 1876, the defendants possessed and operated a railroad running from Chicago to Philadelphia; that plaintiff on said date paid a reasonable price to the defendants to be safely carried from Chicago to Philadelphia in the cars used and operated upon said railroad by defendants, and became a passenger in certain cars, commonly called sleeping cars; that it became and was the duty of defendants to furnish secure and safe cars and appliances therein, and to employ competent servants; yet the defendants did not regard their duty in that behalf, nor use due care, and while plaintiff, with due

care, was sitting in a seat of a sleeping car, the upper berth, by reason of the defective and unsafe appliances for upholding the same, and the unskillfulness, carelessness and incompetency of the servants of said defendants, became detached without plaintiff's fault, and fell upon plaintiff's head, by reason of which he was greatly injured, obliged to pay out large sums of money for medical attendance, suffered great pain, was hindered from doing business, thereby losing great gains, etc.

*Second Count.* That the P., Ft. W. & C. R. R. Co. and the Pennsylvania Company were the owners of the railroad; that they and the Pullman Palace Car Company were operating and using upon said road sleeping cars; that the accident happened by reason of the bolts and fastenings of the upper berth being out of repair, and through the negligence of defendants' servants in the management of the car, and of said fastenings, etc.

*Third Count.* That the plaintiff was a passenger in one of the trains of the P., Ft. W. & C. R. R. Co. and the Pennsylvania Company and in one of the sleeping cars owned and operated by the Pullman Palace Car Company and the P., Ft. W. & C. R. R. Co. and Pennsylvania Company, to be carried for reasonable hire paid to the defendants; that the accident happened through the negligence of the servants of the defendants in the management of the bolts and fastenings of the upper berth, etc.

*Fourth Count.* That the accident was caused through the defective condition of the bolts and fastenings of the upper berth, etc.

The Pullman Palace Car Company and the Pennsylvania Company accepted service, and the latter company pleaded the general issue (pages 6 and 7 of record).

The plaintiff then dismissed his suit against the Pullman Palace Car Company and the P., Ft. W. & C. R. R. Co.

and filed an amended declaration against the Pennsylvania Company alone, to which it re-filed its plea.

The amended declaration is substantially the same as the original, charging (pages 7 to 11 of record):

That the defendant operated the railroad and that plaintiff was a passenger for hire, who was injured by the falling of an upper berth in the sleeping car. The injury is alleged in the first count to have been caused by defendant's breach of its duty to furnish safe *cars* and competent servants. In the second count, from a breach of its duty of furnishing safe *sleeping cars* and competent servants. In the third, of furnishing safe sleeping cars, and in the fourth of furnishing competent servants.

The case was thereupon transferred to the United States Circuit Court upon plaintiff's petition, and a trial had before a jury, resulting in a verdict for the plaintiff of ten thousand dollars (pages 11 to 15 of record). A motion for a new trial was made and overruled, and judgment entered for $10,000 and costs, from which defendant has appealed.

It appears from the record (page 15) that defendant was the lessee and operator of the Pittsburgh, Fort Wayne and Chicago Railway. On June 5, 1876, the plaintiff purchased at its office in Chicago, for $14.40, a first-class railroad ticket from Chicago to Philadelphia.

At the same place he bought also a Pullman Palace Sleeping Car ticket, entitling him to ride in that company's car from Chicago to Philadelphia and paid for the same the sum of five dollars. Plaintiff further testified (pages 15 and 16 of record), that he bought the sleeping car ticket for the purpose of occupying the car to sit in during the day and sleep in at night.

He often rode in sleeping cars and the way he secured accomodations therein was by the purchase of sleeping car tickets, as distinguished from railroad tickets. He

knew of various sleeping car companies and had been acquainted with the Pullman Palace Car Company since its organization. Before taking the train he was aware that the sleeping car was one of the Pullman Company's and used his sleeping car ticket for passage therein.

He testified further (page 16), that the Pennsylvania Company, the defendant, provided cars in which passengers could ride, without necessitating the purchase of a sleeping-car ticket, and that he would have gone into one of those cars if he had not purchased a sleeping-car ticket.

He took the train on the afternoon of June 5th, and slept in the sleeping-car. The next morning he met a friend, the witness, Trowbridge, while breakfasting at Alliance, and was invited by him into the Pullman Sleeping Car, next ahead of the one in which plaintiff had been traveling. Plaintiff accepted the invitation, and seated himself with Trowbridge in the section occupied by the latter. While they were thus seated, engaged in conversation, the upper berth fell. The porter of the car came at once and put up the berth, saying that it would not fall again. Plaintiff and Trowbridge resumed their conversation, but shortly the berth fell again. This time it struck plaintiff's head, and so injured it as to require medical treatment.

Each sleeping-car had a conductor and a porter, the conductors wearing a distinctive uniform. The porter performed such services as making up the berths and attending to the wants of the passengers. Plaintiff did not know whether or not the Pennsylvania Company had any control over the interior arrangements of the sleeping-cars, such as letting down and putting up berths. The witness, Trowbridge, purchased his Pullman Palace Car Company ticket at Chicago.

The record shows (page 17), that the business of the Pullman Palace Car Company is the running of sleeping-

cars on the various railroads. Plaintiff introduced in evidence a time-card of the defendant, which states, in effect, on what trains, and to what points the Pullman Company's cars were run, and giving the price of berths in the same. (Pages 17 and 18).

It thus appears from the record that plaintiff knowingly entered into two contracts. One with the defendant, whereby he became entitled to ride in one of the cars usually provided for the transportation of passengers who do not contract with the Sleeping Car Company for a passage in the latter's cars. The other, a contract with the Pullman Palace Car Company, entitling him to the use and occupation of its cars.

That the injury was caused either by the insufficiency of the fastenings of the upper berth in the latter company's car, or through the negligence of the porter who had the management of said berth, and was in the employ and under the exclusive control of said company.

## Errors Assigned.

Now comes the Pennsylvania Company, by its attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

*First.* That the court erred in overruling the objection interposed by the plaintiff in error to the following question asked the witness Roy, and in admitting the answer to the same, to wit:

Q. "Will you give the ages of your children?"

To which plaintiff replied that one son was ten years old, that one daughter was fourteen years old, that another daughter was seventeen years old, and that another of his daughters was twenty-one years old.

For that said question and answer were immaterial and incompetent.

*Second.* That the court erred in overruling the objection interposed by the plaintiff in error, to the following question asked the witness Roy, and in admitting the answer to the same, to wit:

Q. "What is your financial situation?"

To which the plaintiff replied that he had two parcels of real estate, both of which were mortgaged to the amount of seven thousand dollars; that one parcel was rented for twenty dollars per month, and the other not rented, and that he had no other sources of income since his injuries.

For that said question and answer were immaterial and incompetent.

*Third.* That the court erred in sustaining the objection of defendant in error to the proof offered on behalf of the plaintiff in error as follows, to wit:

"1. That the sleeping-car in which the accident in

" question occurred, and all the sleeping-cars then and " theretofore, since the 27th January, 1870, on the defen- " dant's line, were owned by the Pullman Palace Car Co., " a corporation of the State of Illinois, and were not owned " by the defendant; that said sleeping-cars were run in the " same trains with the defendant's cars; that holders of " railroad tickets were entitled to ride in said sleeping- " cars, provided such holders also held sleeping-car tickets.

" 2. That said Pullman Palace Car Co., and it only, " issued tickets for sale entitling passengers to ride in said " sleeping-cars; that such tickets were plainly distinguish- " able from railroad tickets, and were sold at offices estab- " lished by said company, and indicated to be a place for " the sale of such tickets; that the plaintiff purchased the " sleeping-car ticket of the same person of whom he " bought the railroad ticket; that the office where pur- " chased indicated by plain lettering upon the door of said " office that it was a place for the sale of Pullman Palace " Car Company tickets, as well as railroad tickets.

" 3. That said Pullman Palace Car Company employed " persons to take charge of said cars, and whilst in use the " same were in the immediate charge of a conductor and a " porter employed by said company; that said conductor " and porter were the only persons who had authority to " manage and control the interior of said cars, and the " berths and seats and the appurtenances thereto."

*Fourth.* That the court erred in instructing the jury as follows, to wit:

" That the proof tends to show that the injury was re- " ceived by reason of the negligence of the defendant's " agents or servants, or by some negligence in the con- " struction of the car in which the plaintiff was riding."

For that said instruction was unsupported by the testimony, and also assumes, as a matter of fact, that the per-

sons in charge of said sleeping-car were defendant's agents or servants. The evidence of both the plaintiff and the witness, Trowbridge, shows that the injury was caused by the falling of a berth in a car belonging to and operated by the Pullman Palace Car Company.

If there was negligence on the part of the porter, it was the negligence of an employee of that company. There is no evidence of any such relation between that company, its agents and employees, and the plaintiff in error as to establish the rule of *respondeat superior* in this case.

*Fifth.* That the court erred in instructing the jury as follows:

2. That "the defendant has offered in your presence to "prove that the car in which the plaintiff was injured was "not the car or the actual property of the defendant, but "was the property of another corporation. But I instruct, "as a part of the law of this case, that if this car composed "a part of the train in which the plaintiff and other passen- "gers were to be transported upon their journey, and the "plaintiff was injured while in that car without any fault "of his own, and by reason either of the defective con- "struction of the car or by some negligence on the part of "those having charge of the car, then the defendant is "liable."

For that said instruction is contrary to the law.

And the said Pennsylvania Company prays that the judgment aforesaid may be reversed, annulled and altogether held for naught, and that it may be restored to all things which it hath lost by occasion of the said judgment.

J. T. BROOKS,

*Att'y for Pl'ff in Error.*

## ARGUMENT.

*As to First Error.* It is apparent that the object of this question was not merely to ascertain the ages of plaintiff's children; nor were their ages an issue in the case; but plaintiff was allowed in reply to inform the jury that he had four children. One only being a boy, and he ten years of age, the inference was of course that they were all dependent upon the exertions of plaintiff for a living. Hence the sympathies of the jury were enlisted and stimulated, and the result was the enormous verdict rendered.

In *City of Chicago* v. *O'Brennan*, 65 Ill., 160, an action similar to the one at bar, the plaintiff was permitted at the trial to testify that he had a wife, seven young daughters and two sons.

The Supreme Court say: "Was this evidence admis-
"sible? If it was, then it would have been competent to
"have gone further and shown all the circumstances: such
"as that the mother was an invalid; that one of the
"daughters was blind; that one son had accidentally lost a
"leg, etc., if such had been the case, so as to present a
"most pitiable picture of a helpless family dependent
"upon appellee for support as a lecturer. For, as the
"evidence had no place in the case, but as a stimulant to
"the sympathy of the jury, it would be just as competent
"to make the stimulant strong as weak. *But it was not*
"*competent at all.* It is an elementary rule that the evi-
"dence must be confined to the points in issue. * *
"Could it have any legitimate bearing upon the question
"of damages? By no means. * * * This

"sort of attempt to foist irrelevant matters upon the attention of the jury, with a view to creating a personal "interest, is too often the secondary resort of a *party* on "the witness stand who is too conscientious to commit "perjury, but not sufficiently self-possessed to resist the "impulses of feeling and self-interest. Next to the "temptation to perjury, this practice constitutes the chief "vice springing from the statute making parties competent "witnesses, and makes no inconsiderable degree of watchfulness necessary to keep them within the rule requiring "the evidence to be confined to the points in issue." The case was reversed because of the admission of the improper testimony.

Precisely the same question was presented before the Illinois Supreme Court in *Pittsburgh, Ft. Wayne and Chicago Railway Co.* v. *Powers*, 74 Ill., 341. This also was an action for a personal injury, and the judgment against the railroad company was reversed solely on the ground that evidence was admitted showing that the plaintiff had a family and was unable to support them since his injury. It was there held: "Such evidence is well calculated to "unduly enhance the damages, and to influence the jury "to give damages beyond what is a compensation for the "injury received. * * * It is impossible for "us to know what portion of the verdict in this case was "allowed, because appellee had a family. The evidence "was before the jury for the purpose of enhancing the "damages, and we have no doubt it produced the result. "This was manifest error."

In *Stockton* v. *Frey*, 4 Gill., (Md.) 406, it was, held that, in an action to recover for injuries caused by the upsetting of a stage coach, evidence that plaintiff had a family, consisting of a wife and several small children, was improperly admitted. The court say:

"If in an action of this character, it be legal to offer

" evidence of the relations of husband and wife, and father " and child, by way of augmenting the damages, it would " be difficult to determine what relations in civil and social " life might not be offered for the same purpose. * * * " Instead of meting out to the plaintiff the measure of " damage which he has sustained from the injury, it would " be compensating the wife and children for that injury."

*As to Second Error.* There was no claim made in this case for exemplary or punitive damages. Nor is there ground for anything more than compensation. The accident was without fault on the part of the railroad company and its employees, and while it was technically held guilty in the Circuit Court, there was no evidence to sustain a claim for punitive damages.

*Milwaukee, etc., R. R. Co.* v. *Arms, et al.*, 1 Otto, 489.

The admission of plaintiff's testimony as to his pecuniary condition, was, therefore, manifest error. It is to the effect that he had no source of income since his injury, save the rental from his real estate. This amounted to twenty dollars a month, and out of this he had to pay, besides taxes, the interest on a mortgage of $7,000. The latter alone would be, at 7 per cent., over forty dollars a month. In other words, his income was less than nothing.

That it is incompetent to show the poverty of the plaintiff in this class of cases is a well settled rule of evidence.

In *City of Chicago* v. *O'Brennan*, *supra*, the court say:

" Would appellee's counsel contend that it was compe- " tent for him to give direct evidence of his client's pov- " erty? There is a class of cases, but quite distinguishable " from this, in which it has been held, that the party " injured *may* show his own poverty of circumstances as " well as the wealth of his opponent, as bearing upon the " question of damages. But that class is of a different

" character, and where the jury are warranted in going " beyond the actual, and in giving exemplary or punitory " damages."

In a suit under the Illinois statute giving an action to the widow and next of kin for the *pecuniary loss* from the negligent killing of the intestate, it was held that the wealth or poverty of such widow and next of kin could not be considered in assessing the damages.

*Ill. Central R. R. Co.* v. *Baches*, 55 Ill., 379.

To the same effect is,

*C. & N. W. Ry. Co.* v. *Bayfield*, 37 Mich., 205.

In *Shea* v. *P. & B. V. R. R. Co.*, 44 Cal., 414–429, an action for personal injuries, the court held as follows:

" The proposition that the jury may take into consider- " ation the fact, if it be proven to their satisfaction, that the " plaintiff 'is a man who has to depend upon his manual " labor for a living,' cannot be sustained on principle, and " is not supported by any authority which has been brought " to our notice. * * *The damages are not in " any way dependent on the wealth or poverty of the " plaintiff.*

The learned Judge in the Circuit Court recognized the error in the admission of this testimony, and attempted to correct it by charging the jury that they " should not " take into consideration any evidence touching the plain- " tiff's pecuniary condition at the time he received the in- " jury," (p. 19 of record). That the mischief done by the admission of this testimony could not be so cured is evident.

In *L., B. & M. R. R. Co.* v. *Winslow, et al.* 66 Ill., 219, the question arose, as in the case at bar, whether an instruction to disregard testimony improperly admitted, cured the error. It was held that it did not.

The Court say:

" It is true, the court, in a proper instruction to the jury, " directed them to disregard all testimony of that char- " acter, but the wrong was done, and it is not always easy " to remove from the minds of a jury impressions pro- " duced by testimony which the court has admitted against " objections. It is of the utmost importance, in trials by jury, " that the testimony given to them should be free from all " exceptions. * * * The inevitable tendency " of such evidence is to mislead, and the extent of the mis- " chief produced by it cannot well be calculated. We are " compelled to belive, from the amount of this verdict, " that this testimony had a great influence on the minds of " the jury, inducing them instead of assessing just com- " pensation for property taken for railroad purposes, to " mulct the corporation in damages for a willful trespass."

This ruling was affirmed in *Lycoming Fire Ins. Co.* v. *Rubin*, 79 Ills., 402, and the doctrine again asserted that, " where improper evidence is permitted to go to the jury, " against objection, the mischief cannot be remedied by " afterwards instructing the jury to disregard it."

The judgment in this case is for ten thousand dollars ($10,000). A judgment of so large an amount for personal injuries has never, in the long list of such cases, been sustained in the courts of Illinois. The limit of recovery for causing death itself is fixed by statute at $5,000. (Rev. Stats. Ills. 1874.)

The verdict was obtained partly through the testimony of " experts," as to the permanency of the effect of the injury. We are informed that these expert opinions, as is often the case, have since the appeal been falsified by practical experience.

But this aside, the prime cause of the excessive verdict was the admission of the improper testimony against ob-

jection. It is at best a difficult task to get a jury to confine their verdict within reasonable limits in an action for personal injuries brought against a corporation, where no improper testimony is admitted. But when the plaintiff is allowed by the court to work upon the feelings and sympathies of the jury by detailing to them in his testimony the number, age and sex of his children, dependent upon him for support, and laying before them a statement of his financial condition, showing himself in debt and without resources, justice then is impossible.

*As to Third Error.* The evidence offered was excluded by the court on the theory that the case at bar was governed by *Railroad Co.* v. *Barron*, 5 Wall., 90. That was an action against the Illinois Central Railroad Company for the killing of one of its passenger through a collision, caused partly by the negligence of the Michigan Central Railroad. The defendant had leased or granted to the Michigan Central the right to run on the track owned exclusively by defendant, and "by its charter, un-"der its sole control to carry passengers and property." (5 Wall., p. 94.)

Following the decisions of the Illinois courts, it was held that the Illinois Central could not relieve itself of its responsibility to one of its passengers by allowing another railroad to use its tracks. The lower court charged the jury that, "The Illinois Central Railroad Company en-"gaged to carry Judge Barron safely from Hyde Park to "Chicago," and hence was liable under its contract for an accident to him, caused by a lessee company running on its tracks.

An inquiry into the reason of the doctrine that a railroad company is liable to one of its passengers for the negligence of its lessee, will show the limitations of the rule and its inapplicability to the case at bar.

The question arose and is discussed at length in the

leading case of *Ohio & Mississippi Railroad Company* v. *Dunbar*, 20 Ill., 623 :

"The question seems to be new, * * and it may "be well to advert to some of the general principles which "govern bodies of this character. They undoubtedly de- "rive all of their privileges, as well as their existence, from "the power that creates them; and we must look to their "charter for their power to act. * * *When these "bodies accept their charters, they are held to enter into a "contract with the State, to discharge all the duties imposed, "and to exercise the rights and privileges conferred on them "in the manner prescribed.* * * If such leases may be "made, and the effect claimed results from them, railroads "may avoid all liability to the public."

The *Barron case* is but an affirmance of the law as here laid down. (See cases cited in opinion.)

*Thomas et al. v. West Jersey R. R. Co.*, U. S. Supreme Court, March 29, 1880.

The rule is that common carriers cannot divest themselves of liability to passengers upon the duties imposed by charter, by deputing to others the performance of such charter duties.

But the rule can not in reason extend to extra, luxurious accommodations which the common carrier is not bound under its charter to provide.

*Ratio est legis anima, mutata legis ratione mutatur et lex.*

In the case at bar, Roy was a passenger of the Pullman Car Company. He bought a ticket of that corporation, and his injury was caused either by a defect in the upper berth of its car or through the negligence of a porter in its sole employ. The evidence introduced and the evidence rejected tended to show these facts. It is true he was also a passenger of the defendant. But had he been *merely* a passenger of the latter company he could not

have entered the Pullman car, and would have encountered no risk from falling berths.

Under its contract with Roy, and by its charter, what were the duties of the railroad company towards its passenger?

They were to provide for him safe transportation from Chicago to Philadelphia in the customary first-class coach.

The law required of it the highest possible care in the construction of the track, in the management of the same, and keeping it clear from other trains, in the running of the locomotive, in providing properly-built and secure ordinary coaches.

Under its contract with Roy and by its charter, what were the duties of the Pullman Palace Car Company towards its passenger?

They were to provide him with a *safe* seat and berth in its cars, and certainly included the duty of securing him against the danger of a falling upper berth.

The "duties imposed" by its charter, to use the language of the Illinois Supreme Court, which it is incumbent upon the railway company "to discharge," do not and can not include the providing of a luxurious sleeping coach for its passengers. The record shows, and it is a fact as well known to Roy as to the rest of the public, that this is the business of a class of corporations organized for that special purpose.

If it were one of the duties of common carriers to provide such cars, an action would lie for a failure to provide them—a proposition which no one has ever yet had the temerity to advance. The distinction between the duties imposed upon railroad companies, and upon sleeping car and drawing-room car companies, has often been recognized by the courts. It is also recognized by the legislatures of those States which have passed "Granger" laws,

and in those States which have by law regulated the prices of berths to be demanded by sleeping car companies.

The defendant in error himself recognized the distinction by entering into a contract with each corporation.

The railway company discharged the duties imposed by its charter and its contract with Roy, in respect to accommodations when it reserved for him a seat in the usual first-class passenger car. This was all the accommotion he was entitled to by the purchase of his railroad ticket. He knew it, and, not being satisfied with such accommodations, entered into a further contract with the Pullman Car Company for the privilege of a sleeping berth, a more comfortable and ample seat, an easier riding car, and all the numerous luxuries provided by that company in its cars. Roy was a man of large experience in traveling, was well acquainted with the business of sleeping car companies, and knew that unless he made a contract with the Pullman Company, he could not ride in one of its cars (pages 15 and 16 of record). Having the option of riding in a car of the railway company, or a car of the Pullman Company, he chose the latter and must be held to have waived his claim against the railway company, on its duty as common carrier, under the contract with him, to provide safe and secure cars. For it did provide such cars, but he chose not to use them.

The plaintiff in error can not be estopped as against Roy from showing that the Pullman Company's cars were not its cars, and the Pullman Company's servants were not its servnnts, by the fact that these cars were advertised to be and were hauled in the railway company's train, and a passenger on them must have a railroad ticket. This ticket was, and Roy knew it was, a contract for transportation in the usual day car. If he had not known the sleeping car was the property of the Pullman Company, and had not entered into a contract with that com-

pany, the case might have been different. But there can be no estoppel where no one is misled or deceived, and the evidence offered was improperly excluded.

*Illinois Central R. R. Co.* v. *Hall et al.*, 58 Ill., 409, was an action against that company by a shipper for the escape of certain hogs from a car while *en route* over defendant's road. The car selected by the shippers for the transportation did not belong to the defendant, but was the property of the Michigan Central R. R. Co. The court held that the following instruction should have been given, and its refusal was error:

"If the jury find, from the evidence, that plaintiffs sent "for cars of the Michigan Central Railroad Company in "which to ship their hogs, then the plaintiffs take all the "risk of damage their hogs might receive by reason of "said cars being unsafe, or the doors thereof in bad order, "and if the jury find, from the evidence, that some of the "plaintiffs' hogs did get out of said Michigan Central cars "by reason of said cars being unsafe, or the doors thereof "insecure, then they will find for the defendant on all "counts claiming damage from hogs jumping from such "cars."

We submit that this is on all fours with the case at bar. In both the plaintiff had the option of taking a car belonging to and furnished by the defendant; in both he chose instead to enter into a contract with another and distinct corporation for the use of its car, to be hauled by the defendant company.

In both, therefore, he must be held to have elected to hold the company furnishing the car for damage resulting from any defects therein, as distinguished from damage resulting from negligence in the management of the train or in the construction of the track.

The distinction between damage resulting from any de-

fect in a car received by a railroad on its tracks, and that from negligence in the operation of the road or construction of its track, is incidentally recognized in *Schopman* v. *Boston, etc., R. R. Co.*, 9 Cushing, on page 30.

*Clymer* v. *Central R. R. of N. J.*, 5 Blatch., 317.

*Wright* v. *Midland R. R.*, L. R. 8 Ex., 137.

*As to Fourth Error.* Let us admit, for the sake of the argument, that the fact that Roy was obliged to purchase a railroad ticket in addition to his Pullman ticket in order to travel in the sleeping cars, shows that as to such accommodations the Pullman Company occupied the position of sub-contractor of the railway company. Yet the servants of the Pullman Company do not thereby become the servants of the Pennsylvania Company. There is not a particle of evidence that the railway company exercised any control over, or superintendence of, the porter of the Pullman car, whose negligence is alleged as the cause of the accident. Nor is there any evidence of any such relation existing between the companies, or between the servants of one and the servants of the other, as to make one company responsible for the negligence of the other's servants.

The celebrated case of *Laugher* v. *Pointer*, 5 Barn. & Cres., 547, is directly in point on this question. That case is referred to and approved in *Hinde et al.* v. *Wabash Navigation Co.*, 15 Ill., 72, where the court refers to it as follows:

"That was a case where the owner of a carriage hired "a stable-keeper to furnish him for a day with horses and "a driver, and through the carelessness of the driver, the "plaintiff was injured, and the court was equally divided "as to the liability of the owner of the carriage. That "case was considered in 1826. In 1840, that precise ques- "tion was again up in the case of *Quarman* v. *Burnett*, 6 "Meeson & Welsby, 499, when the court unanimously de-

"cided that the owners of the carriage were not liable for "the carelessness of the driver."

The corollary to this is, that the owner of the horses and the master of the driver is not liable to the passenger for a defect in the carriage, permitted through the negligence of the owner thereof. A parallel case to the one at bar is that of a man who goes to a stable-keeper and desires to engage a horse and coupe. He is informed that the stable-keeper has nothing but hacks and buggies, but that a coupe can be procured of John Smith near by. The party contracts with the stable-keeper for a horse and driver and with John Smith for the coupe. The coupe breaks down by reason of a nut or bolt misplaced by John Smith's servant. That the passenger cannot recover of the stable-keeper is well settled law.

*Hilliard* v. *Richardson*, 3 Gray, 349, approved in *Chicago City* v. *Robbins*, 2 Black, 418, lays down the rule that, to hold one liable for acts of a sub-contractor and his servants, there must be some supervision or control exercised. This is followed in *Railroad Co.* v. *Harris*, 15 Wall., 649, where the liability of the company is placed expressly on the ground that it did, in fact, have general and special control of the work done. The court say:

"In *Painter* v. *Mayor*," (46 Penn. St., 213) "STRONG, J. "holds the defendant not to be liable, and says, 'the de- "fendants have no control over the men employed by the "contractors, or over the contractors themselves. They "could not dismiss them or direct the work.' The cases "are reviewed and the rule laid down as it is hereinabove "stated."

The charge of the court to the jury, in that there was no evidence that the Pennsylvania Company exercised any control over or superintendance of the porter of the Pullman car, was therefore unsupported by the testimony,

and was erroneous in assuming as a matter of fact, that such porter was a servant of defendant.

*As to Fifth Error.* The liability of defendant under this instruction is based on the simple fact that the car "composed a part of the train" drawn by defendant's locomotive. If this alone is a sufficient cause of action against the plaintiff in error, it becomes at once an interesting question to railroads whether there is any limit whatever to their liability.

For example, the Pennsylvania company hauls over its tracks, in connection with its regular trains, from Chicago to Mansfield, Ohio, the passenger cars of the Erie Railway. Under this instruction a passenger of the latter company, who buys of it a ticket from Chicago to New York, can hold the Pennsylvania Company liable for damages resulting from a defect in the Erie Company's car while it is *en route* between Chicago and Mansfield. Again, it is well known that cattle are placed in cars throughout the Western States to be hauled over various distinct and separate roads to the seaboard. Can it be maintained that each separate line is responsible to the shipper for a defect in the car selected by him, on the simple ground that it was "part of the train"? Is the Boston and Albany Railroad responsible to the Kansas shipper for a defect in the car of the Kansas Pacific, on this ground alone?

We submit that the rule laid down in this instruction is beyond all reason and precedent, and imposes an unwarranted liability upon railroad companies.

The right of action of defendant in error against the Pullman Car Co., which he is now seeking to enforce in the State courts of Illinois, is perfect. As Judge NELSON says in *Navigation Co.* v. *Merchants' Bank*, 6 Howard, 378:

" The court looks at the substantial parties in interest, " with a view to avoid circuity of action."

Roy should accordingly be compelled to seek his remepy against the party causing the injury, the Pullman Car Company.

We ask in conclusion, that plaintiff in error be permitted to show that the injury to Roy was entirely without fault, actual or constructive, on its part. If this can not be granted, then we respectfully submit, that the judgment should be reversed for the errors apparent in the record, resulting from the admission of improper testimony and from the instructions of the court below.

J. T. BROOKS,

*Att'y for Plaintiff in Error.*

OFFICE SUPREME COURT U. S.
FILED
OCT 18 1880
JAMES H. McKENNEY, Clerk.

IN THE

# SUPREME COURT OF UNITED STATES.

THE PENNSYLVANIA COMPANY,
*Plaintiff in Error,*

*v.*

JOSEPH E. ROY.
*Defendant in Error.*

## BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

GEO. WILLARD,
Of Counsel for Plaintiff in Error.

Beach, Barnard & Co., Legal Printers, 104 Randolph Street.

IN THE

# SUPREME COURT OF UNITED STATES.

THE PENNSYLVANIA COMPANY,
*Plaintiff in Error,*

*v.*

JOSEPH E. ROY.
*Defendant in Error.*

## BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

MAY IT PLEASE THE COURT:

In *Boorman* v. *Brown*, 3 Adolph. & Ellis, 525 New Series, (cited with aproval in *New Jersey Steam Navigation Co.* v. *Merchants' Bank*, 6 Howard, 411,) Chief Justice TINDAL delivering the opinion of the Court, says: "That there is a large class of cases in which the founda- "tion of the action springs out of contract between the par- "ties, but which, nevertheless, the remedy for the breach, "or non-performance, is indifferently in assumpsit, or in "case upon tort, is not disputed. * * * The principle "in all these cases would seem to be, that the contract "creates a duty, and the neglect to perform that duty, or "the non-performance, is a ground of action upon tort."

The principal case is wholly within that class, and the first question to be considered is: What was the contract between the parties?

The plaintiff below, by his amended declaration, avers that the contract relations between himself and the defendant were substantially as follows:

That the defendant was operating and using upon its said railroad sleeping-cars, for the conveyance of passgers therein.

That he became a passenger in one of said sleeping cars for certain reasonable reward theretofore paid by him to said defendant in that behalf.

That it thereupon became the duty of said defendant to provide safe and secure sleeping cars, and to employ careful and competent servants to manage said cars, so that he might be secure from injury whilst using and occupying said cars.

That the defendant did not use due care in that behalf, but on the contrary, the *appliances used by it* to sustain the upper berths in said sleeping cars were defective and out of repair, and *the servants of defendant* carelessly managed the said cars and appliances used as aforesaid, whereby, whilst the plaintiff was such passenger and sitting in one of the seats in said sleeping cars, one of the upper berths therein, *by reason of the defective condition of such appliances* and *by reason of the carelessness of said servants of the defendant in managing said appliances*, fell upon the plaintiff whereby etc.

It is not averred in the declaration that the defendant was a common carrier, but if it be assumed that it was a common carrier, it would be bound upon reasonable reward paid or tendered by the plaintiff, to render to him such service only as its charter required, or such as the defendant

held itself out to the public as being ready to perform, or such services if any, within its powers, as it specially undertook to perform for the plaintiff.

*Johnson* v. *R. R. Co.*, 4 Ex., 367.
*Hannibal R. R. Co.* v. *Swift*, 12 Wall., 270.
*Chicago & A. R. R. Co.* v. *Thompson*, 19 Ill., 578.
*W. Trans. Co.* v. *Newhall*, 24 id., 466.
*C. & N. W. R. R. Co.* v. *The People*, 56 id., 365.
*Tunnel* v. *Pettijohn*, 2 Harring. Del., 48.
*Cin. & L. Mail Co.* v. *Boal*, 15 Ind., 345.

The obligations, if any, either general or special, resting upon a carrier, must be averred in the declaration and established by proof before a recovery can be had.

Angel on Carriers (5 Ed.), secs. 102, 103.
*Citizens' Bank* v. *Steamboat Co.*, 2 Story, 16.
*Chicago & A. R. R. Co.* v. *Thompson*, 19 Ill., 578.
*Toledo W. & W. R'y Co.* v. *Roberts*, 542.

The onus of proof in this case was, therefore, upon the plaintiff to establish the averments, that the defendant undertook and obligated itself to carry the plaintiff from Chicago to Philadelphia, and surround him with sleeping car appliances whilst upon the journey.

The defense is based upon a denial, that the defendant ever assumed such an obligation, either under its charter or from the way in which it held itself out to the public, or from any special contract with the plaintiff.

The defense involves no attempt to escape an assumed obligation or duty. On the contrary, the defense is, that no obligation of the kind averred ever existed.

This distinction should, I think, be kept in view.

Now, the questions raised by the pleadings, and which are material to be here considered, in order to determine the question of contract, are as follows:

1. Was the defendant operating and using upon its said railroad, sleeping cars for the conveyance of passengers therein, according to the real *gist* of the action?

2. Did the plaintiff become a passenger therein for certain reward theretofore paid to the defendant?

3. Did the defendant undertake to provide safe appliances for holding up the sleeping berths in such sleeping cars?

4. Was it from negligence on the part of any of the defendant's servants that the berth fell upon the plaintiff?

Any proper evidence which tended to prove the affirmative of any of these questions, was doubtless competent, and of course any proper testimony which tended to rebut any such affirmative evidence, would also be competent.

The record shows that on behalf of the plaintiff below, evidence was introduced tending to show as follows:

That he bought at the defendant's office a first-class railroad ticket from Chicago to Philadelphia.

That at the same time and place, and of the same person, he bought a sleeping car ticket.

That he had traveled a great deal, and often rode in sleeping cars since such cars came into use.

That the way in which he obtained sleeping car accommodations was by the purchase of sleeping car tickets.

That he knew of various sleeping car companies, including the Pullman Palace Car Company, with which he had been acquainted since its organization.

That when he bought the sleeping car ticket he did not know what company ran the sleepers, but when he got to the train he saw it was a Pullman car.

That the defendant provided cars in which passengers having railroad tickets could ride without the purchase of sleeping car tickets, and that he would have gone into one of those cars if he had not purchased a sleeping car ticket.

That he did not know whether the defendant had control over the interior arrangements of the sleeping cars.

That the defendant ran trains with Pullman Palace Car

That Pullman's sleeping car rates (*not* Pullman sleeping car rates), varied according to place of destination, and according to whether full berths or full sections in the car were used by the passenger.

Now the evidence which tended to show that the plaintiff bought both tickets at the same place and of the same person, might tend to show that the defendant issued the sleeping car ticket, and that, therefore, it received the alleged reward for providing the sleeping car accommodations, and also that the servants in charge of those accommodations were defendant's servants.

Such evidence unrebutted might be sufficient to establish a liability on the part of the defendant.

It does *not* appear that the plaintiff relied upon the sleeping car being owned or that its interior arrangements were controlled by the defendant.

It *does* appear that the plaintiff was well acquainted with the Pullman Palace Car Company from the time of its organization, and knew it was necessary to buy a sleeping car ticket in order to ride in a sleeping car.

It was upon the issues thus formed, and in rebuttal of evidence respecting the time and place of purchase of the

sleeping car ticket, as above recited that the defendant offered to prove

(1.) That the sleeping cars on defendants line were owned by the Pullman Palace Car Company, a corporation of the State of Illinois.

(2.) That said company, and it only, issued tickets for sale entitling passengers to ride in said sleeping cars.

(3.) That such tickets were distinguishable from railroad tickets, and were sold at offices established by that company, and indicated by plain lettering upon the door, that it was a place for the sale of Pullman Palace Car Company tickets, as well as railroad tickets.

(4.) That said company employed persons to take charge of said cars, and whilst in use were in the immediate charge of a conductor and porter, employed by said company.

(5.) That they were the only persons who had authority to manage and control the interior of said cars, and the births and seats, and the appurtenances thereto.

The proof thus offered by the defendant and rejected by the court, had a clear and obvious tendency to rebut any proof on plaintiff's part, tending to show that the defendant operated the sleeping cars in the manner averred. Or that the defendant received the reward which the plaintiff paid for the sleeping car appliances, which were furnished to him on his journey, or that at the time he purchased the sleeping car ticket, he did not know it was from the Pullman Company he was buying, and to them he was paying for said ticket, and not the defendant.

The rule of law which the defendant contended for on the trial below, as applicable to this subject, was thereafter recognized in *Kinsley* v. *R. R. Co.*, 125 Mass., 54. In that case the defendant offered proof to show that it did not

own the sleeping car, but there being no evidence tending to show that the plaintiff was aware of that fact, it was ruled out.

Here, in the principal case, the inference from the plaintiff's own statements is a fair one, that he knew that the Pullman Palace Car Company owned the Pullman palace cars, and operated and controlled all the appliances therein, and that the reward he paid for his use of those appliances was to that company, and not to the defendant.

If he knew such was the fact, then clearly his contract for sleeping car accommodations was with the Pullman company, and not with the defendant. And in such case, is there any good reason why the rights and liabilities, under that contract, should not be confined to the parties thereto, the same as in all other cases of contract?

Whether the plaintiff thus contracted, knowingly, was a question of fact for the jury, and all competent evidence applicable to that question was admissible. Hence, the error of the court in rejecting the proof offered by the defendant.

Respectfully submitted.

GEO. WILLARD,

*Of Counsel for Plaintiff in Error.*

OFFICE SUPREME COURT U. S.
FILED
APR 26 1880
D. W. MIDDLETON, Clerk

IN THE

# Supreme Court of the United States.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

THE PENNSYLVANIA COMPANY,
Plaintiff in Error.

*v.*

JOSEPH E. ROY,
Defendant in Error.

## BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

JOHN VAN ARMAN,
Counsel for Defendant in Error.

CHICAGO:
BEACH, BARNARD & CO., LEGAL PRINTERS, 104 RANDOLPH STREET
1880.

IN THE

# Supreme Court of United States.

THE PENNSYLVANIA COMPANY,
*Plaintiff in Error,*

*v.*

JOSEPH E. ROY,
*Defendant in Error.*

Error to Circuit Court of United States for the Northern District of Illinois.

## Brief and Argument.

May it please the Court:

Two points, in substance, are made by the plaintiff in error in support of his assignments of error in the record in this case.

First: That certain testimony in relation to the family and pecuniary condition of the defendant in error was admitted against objection.

Second: That the court below rejected and excluded certain testimony offered by the plaintiff in error, tending to show that the sleeping car in which defendant in error received his injury, did not belong to plaintiff in error, and was not under its control at the time of the injury.

I.

It appears by the record in this case that the defendant in error testified as a witness in his own behalf, and in the course of his testimony was requested by his counsel to state the ages of his children, to which counsel for plaintiff in error objected, which objection being overruled, the witness in reply stated the ages of his four children.

Subsequently, the following question was put to the witness:

"What is your financial situation?" To which question objection was made by opposing counsel, and overruled, and the question was answered, the answer tending to show that the witness had two parcels of real estate, both mortgaged, from which he was then deriving no income.

The record does not purport to contain the whole of the testimony of this or any other witness, nor does it show whether the above testimony was given in his examination in chief, or on his re-examination after cross-examination by the counsel of plaintiff in error, nor does it appear in what connection such testimony, so objected to, was offered and admitted, or furnish any means of ascertaining on what ground it was admitted.

The counsel for plaintiff in error says in his argument that the court afterwards discovered the error, and sought to remedy it by instructing the jury to disregard the testimony so erroneously admitted.

Now, it is true that the court did most distinctly instruct the jury to disregard said testimony relative to the condition and circumstances of defendant in error, and further gave them plain and full instructions in relation to the measure of damages, which, if obeyed, could not fail to guard them against any error in assessing said damages. (See Record, p. 51.)

The court, in its instructions to the jury, says : "The "plaintiff's damages are the pecuniary loss which he has "sustained in consequence of the injuries sustained. In de- "termining such damages the jury should take into consider- "ation the amount paid by plaintiff for medical attendance "necessary for his proper treatment; the plaintiff's station in "life; his standing in his profession; his ability to earn "money before he was injured; and how far that ability "has been impaired by his injuries, as shown by the proof; "but the jury should not take into consideration any evi- "dence touching the plaintiff's pecuniary condition at the "time he received the injury, because it is wholly imma- "terial how much a man may have accumulated up to the "time he was injured; the real question being how much "his ability to earn money in the future has been impaired, "and in this connection you should take into account such "of the evidence as tends to show that the injuries re- "ceived by plaintiff may be permanent. But the damages "should not be suppositious or speculative, nor vindictive, "but should be such as are clearly indicated by the evi- "dence."

These instructions, if obeyed by the jury, would not only exclude from their consideration all testimony in relation to the condition and pecuniary circumstances of the plaintiff, but would exclude everything beyond his actual pecuniary loss by diminution of his ability to earn money in consequence of his injuries and his necessary expenditures in procuring needed medical treatment.

Certainly, if either party had cause of complaint of this instruction, it was not the plaintiff in error.

But the counsel insists that the amount of the verdict shows that the jury did not obey this instruction, because he asserts that the evidence in relation to the nature and degree of the injury of defendant in error, entirely failed to justify or support a verdict for so large a sum.

He has, however, carefully omitted from the record the entire testimony offered by the respective parties, tending to show the nature and extent of the injuries received by defendant in error, as well as in relation to the money expended by him for medical treatment—omitted every thing in short, which would enable your Honors to determine the question whether the damages assessed by the jury were as the counsel alleges exorbitant and excessive, or were reasonable and supported by the evidence. If he was sincere in his assertion that the evidence adduced on the trial failed to support any such assessment of damages, and actually believed that a perusal of it would lead your Honors to the conclusion which he pretends to have reached, that the verdict was the result of mere sympathy and prejudice of the jury in favor of the plaintiff below, excited by testimony improperly admitted, why did he not by setting forth in the record the evidence upon which the assessment of damages was founded, furnish your Honors with the only proper means of determining that question? Does the counsel expect your Honors to adopt his opinion of the effect of the evidence in relation to the nature and extent of the injuries received by the defendant in error, even if there was nothing in his actions and conduct to impeach its sincerity?

The cases cited by him from the decisions of the Supreme Court of the State of Illinois are not in point.

The Supreme Court of Illinois did not lay down the doctrine that where immaterial and inadmissible evidence had been admitted against objection, and subsequently stricken out, or the jury instructed to disregard it, that the error was necessarily fatal. They only decided that in such a case if they were able to discover by the verdict that the jury had not obeyed the instructions, then they would reverse.

In both of these cases the record contained the testi-

mony upon which the assessment of damages was made, and the court in its opinion states in effect, that upon a full consideration of the evidence upon which the assessment of damages was founded, they discove ed that the damages were manifestly excessive, and as testimony relating to the pecuniary condition of the plaintiff had been improperly admitted, although the court had subsequently instructed the jury to disregard such testimony, still, as the damages were manifestly excessive, they would infer that the jury had disobeyed the instructions of the court.

If the counsel of plaintiff in error desired to satisfy your Honors that the damages assessed by the jury in this case were excessive, it was his right to attempt it. But to do this the evidence upon which the assessment was founded must be set forth in the record.

This Court reverses the judgment of the court below only for errors apparent in the record, and can look to nothing except the record.

By omitting from the record the evidence upon which the jury acted in assessing the damages, the counsel of plaintiff in error has voluntarily deprived your Honors of all means of ascertaining whether such assessment was supported by the evidence or not, and in the absence of such evidence all presumptions are in favor of the correctness of the proceedings of the court below.

Nor does the fact that illegal and especially immaterial testimony has been inadvertently or erroneously admitted, and subsequently withdrawn, or stricken out, by the court or the jury instructed to disregard such testimony, justify any presumption against the correctness of the verdict.

On the contrary, inasmuch as it is the duty of the jury to obey such instruction, the presumption of law is that they did obey it, and that their verdict was founded upon legal evidence only.

It is only where the appellate court is able by an inspection of the record to discover that the verdict is excessive or unsupported by legal evidence, that it will infer that the jury has failed to obey such an instruction.

But the counsel asserts with great positiveness, that the verdict is excessive and wholly unsupported by the evidence, and says that it is even larger than any verdict ever sustained (for personal injuries I presume he means) by the Supreme Court of Illinois.

If it were true, as asserted, that the verdict was unsupported by the evidence, it was important for him to make it apparent to your Honors, because then his authorities would have been in point.

Instead of attempting to enable your Honors to determine the question of the sufficiency of the evidence to support the assessment of damages, he assumes to determine it himself. Instead of arguing this question, he decides it, and kindly gives your Honors the benefit of his opinion.

I could, with equal propriety, and I think with much more candor, assert on the contrary, that the testimony upon which the jury acted in assessing the damages not only fully supports such assessment, but would have justified a much larger verdict. But as I understand the office and duty of a court of review to be limited to a mere inspection of the record, I do not suppose that assertions or statements of counsel can have any weight or influence.

The counsel of plaintiff in error seems to have taken a different view of the subject, for he not only substitutes his own mere assertion of the effect of the evidence as above shown, instead of setting forth the evidence in the record, but he seeks to contradict and impeach the evidence given on the trial in behalf of defendant in error, by statements

since made to him (said counsel) tending to show that certain experts called by plaintiff below as witnesses, have since appeared to have been mistaken in the opinions given by them. Unless the counsel expected your Honors to accept his statements on this subject, as well as his assertion as to the effect of the evidence on the subject of the measure of damages which he chose to omit from the record, it is impossible to understand why he troubled himself to make them.

On the contrary, I entertain the opinion that your Honors will consider nothing beyond the record of the court below, and in passing upon the proceedings of the court below, will assume that everything was regular and correct except such things as appear by the record to have been erroneous. Now, inasmuch as the verdict and judgment in the court below appear in the record, and the evidence as to the amount of the damages is entirely omitted, your Honors cannot find, as the counsel for plaintiff in error seems to expect, that the amount of the verdict is excessive, and unsupported by the evidence.

On the contrary, your Honors, in the absence of the evidence on which the jury acted in assessing the damages, will assume that the evidence was sufficient to support the verdict, even although the Supreme Court of Illinois never sustained so large an one. Indeed, I do not see how it becomes necessary for your Honors to enquire or ascertain whether the Supreme Court of Illinois ever had before it a case in which the damages sustained were as great as in this. The presumption of correctness which a court of review always indulges towards the proceedings of an inferior tribunal whose records it is required to inspect, extends as well to the conduct of the jury as the judge. It will assume that the jury has acted properly and according to its duty, unless the contrary appears from the record.

If the evidence upon which the jury acted in any suit or

matter is not shown, especially when it appears by the record as in this case, that evidence relating to the question was given before them, the court of review will assume that it was sufficient to support their verdict, and whenever instructions were properly given them by the court below, the legal presumption is that the jury obeyed them.

The following authorities, among many others which might be cited, show the views taken by courts of more or less eminence upon the effect of the admission of illegal evidence, followed by instructions of the court to disregard the same:

*Garfield* v. *Kirk*, 65 Barb., 365.
*Unangst* v. *Kraemer*, 8 W. & S., 401.
*Judge* v. *Stone*, 44 N. H., 607.
*The People* v. *Parish*, 4 Denio, 156.
*Hamblett* v. *Hamblett*, 6 N. H., 345–349.
*Deerfield* v. *Northwood*, 10 N. H., 271.
*Thomas* v. *Henderson*, 27 Ala., 529.

The true rule, recommended by convenience and necessity, and supported by sound principle, is clearly stated in the above authorities.

In *Garfield* v. *Kirk*, 65 Barb., 365, the court say:

"An instruction by the court in its charge to the jury, to "disregard evidence on the trial is equivalent to striking "out; and if such instruction does not strike out, then it "follows that illegal evidence cannot be got rid of when "once received, and the court, on discovering the error, "must commence the trial anew, or let it go on, with the "knowledge that the verdict will be set aside, either by "the court itself or on appeal. Such a result cannot have "been contemplated. * * * The "presumption should be that the jury acted only upon the "legal evidence submitted to them, and not upon that

"which they have been told not to regard, or which has "been stricken from the case."

In *Unangst* v. *Kraemer*, 8 Watts & Sergeant's, 401, the court say:

"Under a mistaken supposition that the declaration was "made after the defendant obtained his title, the court er- "roneously permitted the plaintiff to prove that the defend- "ant said there was a dower in the land, but afterwards "discovering that at the time he had no interest, they di- "rected the evidence to be excluded. It is said that the "court, having committed an error in admitting the testi- "mony, it cannot afterwards be corrected by directing the "jury to disregard it. And such undoubtedly is the deci- "sion of the court in *Nash* v. *Gilkeson*, 5 Serg. & Rawle, "352. The reason given is that the impression made by "the evidence could not in the nature of things be entirely "removed; at least, as is said, the court could not be ju- "dicially certain that it had not some effect on the mind of "the jury, and the quantum of that effect is immaterial, "provided it had any. With great respect, I am inclined to "think that the rational presumption is that it had no effect "whatever, as we are not at liberty to suppose the jury "would disregard the direction of the court. * * * "The practical effect of the decision is, that whenever the "court has inadvertently made an erroneous decision, they "cannot correct it, and the only course which remains in "justice to the party in whose favor the mistake is made "is forthwith to discharge the jury. This, it is plain, "would seriously interfere with the course of business, for "although the party might get a verdict, yet it would be "of no avail, as his judgment must be inevitably reversed. "Is it not, therefore, better to leave the correction to the "court which tries the cause, who will grant a new trial, "if there is the least reason to suppose it had an improper "effect on the minds of the jury?"

In *The People* v. *Parish*, 4 Denio, 156, the court (BRONSON, C. J.) say:

"It was improper to give in evidence the representations "made by Hadden, without first showing that he acted by "the procurement of the defendant; and the exception to "the evidence would have been fatal, had it not been for "the instructions subsequently given to the jury, that the "declarations of Hadden must be laid out of the case. I "think that cured the error. * * * * * "It is not unusual for a judge to correct an error into "which he may have fallen in the admission of evidence, "by striking the testimony out of his minutes and telling "the jury to disregard it. When that is done, the excep- "tion which was taken when the evidence was received "should fall to the ground. We ought not to presume that "the jurors disregarded the instructions of the court, and "allowed the evidence to influence their verdict.

"But the defendant's counsel thinks it settled that the "error was not cured by telling the jury to lay the declar- "ations of Hadden out of the case. (*Haswell* v. *Bussing*, "10 John., 128; *Penfield* v. *Carpender*, 13 *id.*, 350; *Irvine* "v. *Cook*, 15 *id.*, 239; *Tuttle* v. *Hunt*, 2 Cowen, 436.) "But these are all cases from justices' courts, where it is "not to be supposed that the opinions of the presiding "officer will have the same controlling influence upon the "jury as will the instructions of the judge who presides on "trials in courts of record. The counsel was unable to "produce any case where the same doctrine had been held "in relation to trials in a superior court; and it would be a "most inconvenient rule, and one which would rarely tend "to the advancement of justice, to hold that a mistake in "the admission of evidence can only be corrected by dis- "charging the jury and commencing the trial *de novo*."

In *Judge* v. *Stone*, 44 N. H., 607, the court say:

"It does not appear distinctly whether the testimony

" offered to contradict Frost was competent or not, because " the case does not show what Frost's statements were. " It is said that he stated what took place at the time of the " assignment, &c., and as to the said Winsor Cooper's con- " dition and mental capacity at the time. Now, if Frost " stated that Cooper then appeared rational, and regular, " and competent, &c., if he gave the jury to understand by " what he said that he supposed said Cooper to be every " way competent to make a valid deed, no matter in what " particular words it was expressed, then the testimony " admitted was clearly competent to contradict him. So " far as we can judge from the case, we presume this evi- " dence was properly admitted.

" It appears from the case that the court, after the closing " arguments of counsel, and after the charge and instruc- " tions of the court to the jury, ruled out all the evidence " that had been admitted subject to the defendant's excep- " tion of Winsor Cooper's statements, such as the testi- " mony of Wood and others, and also the evidence intro- " duced to contradict Frost. There must have been some- " thing very extraordinary in the circumstances of the case " to have warranted this proceeding on the part of the " court unless it was assented to by both parties, which " was not the case here. What these extraordinary cir- " cumstances were, we are not informed, but we must pre- " sume that they were sufficient to warrant the course " pursued, as we think it must be a matter within the dis- " cretion of the court to rule out evidence when it is found " to have been improperly admitted."

I have thus far, in my argument, proceeded on the assumption that the testimony in relation to the condition and circumstances of the defendant in error was shown by the record to have been inadmissible, and therefore its admission by the court erroneous; but although I am willing to admit the correctness of the instruction given by the

court that in assessing the damages, the situation and pecuniary circumstances of the injured party are immaterial and not to be considered, and therefore, that testimony on this subject was not material to the issue, still it often happens that testimony wholly immaterial to the issue may become admissible in the course of a trial. For example, in the present case it appears by the remarks of the judge in his charge, that plaintiff below, for the purpose of showing the pecuniary injury sustained by him, offered evidence tending to show what wages or salary he was able to and did earn in his profession before his injury, and that since such injury he was disabled from earning anything.

Suppose that on his cross-examination, the counsel of defendant had, for the purpose of testing the truth of witness' statement as to his earnings, asked the witness what had became of the large sums of money which he pretended to have earned, and the witness failed to account fully for their expenditure, but had stated that he expended most of it in the maintenance of his family, and had invested some of it in property.

In the re-examination of the witness as tending to further explain the expenditures of his earnings, and to confirm and support his original testimony, it would be competent to ask the ages of the children composing his family, and his actual pecuniary condition, thus showing what had become of his earnings. Whether such was the manner in which the evidence complained of was actually called out, or whether in some other way it may have become admissible, is not negatived by the record.

The utmost that can be claimed is that the record shows that said evidence was immaterial to the issue, but it does not show that it did not become admissible for some legitimate purpose in the course of the trial.

The language of the Court, in instructing the jury to dismiss it from their minds, in assessing damages, seems to indicate that it had been admitted in some such way, and for some such purpose, as above supposed.

He gives as a reason why they should disregard it, not that it was erroneously admitted, but that it is immaterial how much money the party had accumulated before his injury.

II.

The only remaining question in the case arises upon the rejection or exclusion by the Court below of certain offers made by plaintiff in error, as follows, to wit:

"The defendant, to maintain the issue on its part, offered "to prove:

"*First.* That the sleeping car in which the accident in "question occurred, and all sleeping cars then and there- "tofore since the 27th of January, 1870, on defendant's "line, were owned by the Pullman Palace Car Company, "a corporation of the State of Illinois, and were not "owned by the defendant. That said sleeping cars were "run in the same trains with defendant's cars. That hold- "ers of railroad tickets were entitled to ride in said sleeping "cars, provided such holders also held sleeping-car tickets.

"*Second.* That said Pullman Palace Car Company, "and it only, issued tickets for sale, entitling passengers to "ride in said sleeping cars. That such tickets were plain- "ly distinguishable from railroad tickets, and were sold at "offices established by said company, and indicated to be "a place for the sale of such tickets; that the plaintiff pur- "chased the sleeping-car ticket of the same person of "whom he bought the railroad ticket; that the office "where purchased indicated, by plain lettering upon the "door of said office, that it was a place for the sale of "Pullman Palace Car Company tickets, as well as rail- "road tickets.

"*Third.* That said Pullman Palace Car Company em- "ployed persons to take charge of said cars, and whilst in "use the same were in the immediate charge of a conductor "and porter employed by the company; that said conduc- "tor and porter were the only persons who had authority "to manage and control the interior of said cars, and the

" berths and seats and appurtenances thereto; to which " said proof the said plaintiff, by his counsel, objected; " which objection the court sustained. To which said ruling " of the court the defendant, by his counsel, then and there " duly excepted.

" Thereupon the court charged the jury as follows, to- " wit: The proof tends to show that the injury was re- " ceived by reason of the negligence of the defendants' " agents or servants, or by some negligence in the con- " struction of the car in which the plaintiff was riding. " To which charge the defendant, by its counsel, then and " there duly excepted, as being unsupported by the testi- " mony, and also as assuming as a matter of fact that the " persons in charge of said sleeping car were defendants' " agents or servants."

It is manifest, from the portion of the charge of the court below embraced in the record, that the ground upon which the testimony offered by defendant below was excluded was that the evidence so offered was wholly immaterial, because, as it already appeared, that the sleeping cars on which plaintiff below took passage, and on which he was injured, were a part of the train in which plaintiff in error undertook to transport him under the contract evidenced by the passenger ticket, it was quite immaterial who actually owned said sleeping car, or who actually employed or controlled the persons who had charge of it. The defendant in error being a passenger on the railroad owned and operated by the plaintiff in error, was entitled to look to said plaintiff in error for protection from dangers resulting from carelessness and want of skill and diligence on the part of those having charge of any of the cars in said train upon which he was a passenger, and it is also manifest, that the principle involved in said instruction is, that no matter who actually employed the conductor and porter or other servants on said sleeping cars, the

plaintiff in error was responsible to the plaintiff below for their conduct, and therefore, as between the parties to this suit, they were the servants of plaintiff in error and the principle of *respondeat superior* applied the same as though such servants were actually employed and controlled by plaintiff in error. Therefore, inasmuch as the rejection of the evidence offered by defendant was upon the same principle announced in the portion of the charge excepted to, only one question is raised by these two distinct allegations of error.

That question is, in substance, whether a railroad company which admits sleeping cars into its regular passenger trains is responsible for injuries received by its passengers while occupying seats in said sleeping cars, caused by carelessness in the management thereof by the persons in charge.

The ground or principle on which the court below acted in excluding the evidence, as well as in giving such instruction, is, that the railroad company, by admitting said sleeping cars to be run in connection with its passenger trains, and publicly offering inducements to its passengers to avail themselves of the accommodations furnished by said sleeping cars, thereby become responsible for the safety of the passenger while on said sleeping cars to the same extent as while riding on the ordinary passenger cars of said railroad company.

Upon a careful examination of the argument and authorities of the counsel of plaintiff in error upon this point, I can hardly deem it necessary to reply to the same.

The first case cited by counsel of plaintiff in error decides in effect that a lease by a railroad company of its road and franchises, by which it conveys its rights and franchises to another corporation of the same kind, does not relieve it of liability for injuries to passengers over its

road, suffered in consequence of the negligence or misconduct of the lessee.

*Railroad Company* v. *Barron*, 5 Wall., p. 94.

The counsel say that the reason of the rule that a railroad company is liable to one of its passengers for negligence of its lessee, will show the limitations of the rule and its inapplicability to the case at bar, and cites *Ohio and Mississippi R. R. Co.* v. *Dunbar*, 20 Ills., 623, in which the court says that railroad companies undoubtedly derive all their privileges, as well as their existence, from the power that creates them, and must look to their charter for their power to act. "When these bodies accept their "charters they are held to enter into a contract with the "State to discharge all the duties imposed on them, and "to exercise the rights and privileges conferred on them "in the manner prescribed. If such leases may be made, "and the effect claimed for them results from them, rail-"roads may avoid all liability to the public."

The learned counsel very truly says, that the rule here laid down is that common carriers cannot divest themselves of liability to passengers by deputing to others the performance of such charter duties; and he ought to have said, in order to show the full strength and effect of this case, that a railroad company cannot divest itself of its duty to protect a passenger over its road even by a complete surrender of its railroad and franchises to another corporation of the same kind, and under similar obligations to the public, so long as it retains even a reversionary interest in the charter and franchises; for such is the effect of this, as well as many other cases.

But the counsel announces a discovery which he has made, viz.:

But the rule cannot in reason extend to extra and luxurious accommodations, which the common carrier is not

bound to furnish. Then follows a maxim in some foreign tongue, which I am told, means that reason is the soul of the law, and the reason being changed, the law is, or ought to be. This maxim is good enough to be written in English, and I entirely subscribe to it.

The application which the learned counsel makes of it is that if a railroad company offers to its customers for an extra price any accommodations beyond what it is bound by its charter to furnish, and he accepts the offer, pays the extra price, and becomes a passenger, the duty imposed upon the corporation by law to protect its passenger from all such perils as can be averted by proper diligence, ceases.

That is, that the duty of the railroad company to use all reasonable diligence to protect its passengers from injury, applies only to such passengers as are satisfied with such accommodations only as the railroad company is bound by law to afford, and the moment he accepts an offer of the railroad company to afford any better accommodations, he loses all right of protection. Now, while I agree cheerfully to the maxim of the learned counsel, I fail to see any application of it in the case to which he applies it.

If the soul of the law is its reason, the courts of several States, Illinois amongst them, have decided in the very cases cited by the counsel of plaintiff in error, that the reason why a railroad company cannot divest itself of its duty to passengers over its road, even by an actual lease of its track and franchises, is that from its acceptance of its charter, and the rights and benefits thus conferred on the company, a contract is implied on the part of said company to observe and perform towards all passengers over said line all the duties of common carriers. One of which duties is to exercise all reasonable skill, care, and diligence in protecting the safety of such passengers.

This duty, arising from such implied contract, is precisely the same in its extent and obligation as though it had been express, and entered into between the railroad company and the public, represented by some authorized agent, and had contained a clause binding the corporation to exercise in a reasonable, convenient and proper manner, the rights and franchises conferred by the charter, for the period thereof, and among other things, perform all the duties, and sustain the responsibilities of a common carrier of passengers over the route described.

Such, in substance, is the nature of the contract, which, according to the cases cited by the counsel of plaintiff in error is presumed to have been entered into with the public by every passenger railroad company.

Those cases go further, and expessly decide that the obligation of the corporation, chartered to construct and operate any particular line of road, to continue to perform all the duties and discharge the obligations of a common carrier over said road, remains obligatory on said company, even after the said corporation has itself ceased to own said road and operate the same, by leasing or otherwise parting with said railroad and franchises to another company.

That on the contrary, the said corporation, although it may have transferred its property and the use of its franchises to others, remains subject to all the duties and obligations of a common carrier over said road, as to every person passing over the same, and hence, the courts have held the lessor corporation liable to all passengers over said road, for any and all neglect of such duty, by its lessee or its employees, and that in fact, the lessees and its agents and employees are to be for this purpose treated and considered as the servants of the lessor corporation.

The counsel of plaintiff in error, by citing several cases holding this doctrine, seems to recognize it as correct.

I should infer from his authorities that he would admit that, if "The Pullman Palace Car Co." had leased the road and franchises of plaintiff in error for a series of years, and the company lessee were running trains and carrying passengers over said road, the lessor would still be liable for any failure of the duty ordinarily binding on a common carrier towards all passengers over the said railroad.

But he thinks the reason of this rule of liability does not apply in this case, because the Pullman Palace Car Co. is not the lessee of said company, plaintiff in error, and is not carrying passengers over said line, but the said corporation, plaintiff in error, retains its railroad and franchises, and all passengers are carried by plaintiff in error.

The only means of knowing the actual relation of said Pullman Palace Car Company to plaintiff in error must be derived from the evidence on the subject offered by defendant in error.

That evidence consisted of a card or circular of said company, published by it, stating that certain of its passenger trains over said road would contain sleeping cars, and tendering their accommodations to the public, and containing directions where to procure sleeping car tickets.

Defendant in error testified that he procured his ticket at the office of plaintiff in error, of the same person who sold him his passage ticket. That sleeping car ticket differed manifestly from the ordinary passenger ticket, and he recognized the sleeping car as one of Pullman Palace Car Company's cars, and that the conductor and porter of the sleeping car were not the same as those of the other passenger cars, but he had no knowledge of the arrangement for running such sleeping car on said road, or who owned or controlled it.

The plaintiff in error proposed to prove not that the sleeping car was not run by procurement, and for the benefit of plaintiff in error, just as its published card indicated, but only that the title of the car was in another corporation, and when in use its interior arrangement was controlled not by persons in the employ of plaintiff in error, but by employees of its owner.

This was about the only matter offered by plaintiff in error not already proven.

Now, all the proof actually contained in the record tended to show that the plaintiff in error was alone the party which controlled the road and was under obligation to transport the defendant in error over the same, and to furnish him the accomodation of a sleeping car on his journey.

The published offer of said party to furnish both passage and sleeping car accommodations on the very terms which defendant in error subsequently accepted, would leave no doubt, in the absence of further and opposing evidence, that defendant in error was in fact, as well as in law, the passenger of plaintiff in error, as well when enjoying the accommodations of the sleeping car as in passenger cars, and being so the passenger of said company, had a legal right to demand of it all the protection due from a public or common carrier by steam and for hire.

Now, how would the testimony offered by plaintiff in error, if admitted, change the relations of the parties?

If the proof offered had been admitted, would not defendant in error have still been the passenger of plaintiff in error, and entitled to the same protection from it?

Of what consequence is it in whom was the title of the sleeping-car, or any or all of the other cars in which that railroad company undertook and agreed to carry its passengers? Of what consequence, in point of law, is it who

actually was entrusted with the interior arrangement of any or all of said cars?

Could the company escape its liability to its passenger by entrusting the arrangements of its cars to other persons, or by allowing another company to furnish the car for his transportation?

The cases cited by plaintiff in error show that even if the entire control and management, as well as the title of the cars, were in some other, and the passenger had made his contract with such other party, the plaintiff in error would still be treated as the owner, and held bound for the safety of the passenger.

The doctrine contained in the authorities cited by plaintiff in error go far beyond the necessities of this case, for they go the length of holding that a railroad company is incapable of divesting itself of the duties and obligations of a common carrier towards any and all persons transported over the line for which it is chartered, so long as the charter remains in force, no matter who is in possession of said road and exercising its franchises. Whereas, in the case at bar, all the testimony given or proposed tended to show that at the time of the injury, plaintiff in error owned and was in full and exclusive possession of its road and franchises, in the exercise of all those franchises, and that defendant in error became a passenger of said company, under two contracts with said company, one of which bound said company to transport him, and the other to furnish a sleeping car, both of which contracts he had made on the public invitation of plaintiff in error.

I consider the above authorities furnished by counsel of plaintiff in error conclusive in principle, and those hereafter referred to are sufficient to show that whenever the identical question involved in this record, or any question identical in principle has come before the courts of this country, the decisions have been uniform in support of the safe and

wholesome rule so early and frequently announced, that a corporation is bound to exercise its functions and franchises, and cannot escape its public duties or obligations by deputing them to others.

*Thorpe* v. *N. Y. C. & H. R. R. R. Co.*, 13 Hun (N. Y. Sup. Ct.), p. 70, affirmed in Court of Appeals, March 18, 1879. See The Reporter, (July 9, 1879), vol. VIII., No. 2, p. 55.

*Barron* v. *Ill. Central R. R.*, 5 Wallace, 90.

*Brown* v. *Wash., Georgetown & Alex. R. R.*, 17 Wallace, 445.

In *Thorpe* v. *N. Y. C. & H. R. R. R. Co.*, *supra*, the court say: " The defendant was liable for the acts of the " porter of the Wagner car to the same extent as if he " had been hired by, and was in the immediate employ- " ment of defendant."

Respectfully submitted.

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